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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 537

ARTHUR C. HARVEY COMPANY, PETITIONER,

vs.

JOHN F. MALLEY AND OR MALCOLM E. NICHOLS, FORMER COLLECTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 3, 1932

CERTIORARI GRANTED JANUARY 9, 1933

(37,234)

(37,234)

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1931.

No. 2667.

ARTHUR C. HARVEY COMPANY,
PLAINTIFF, APPELLANT,
v.
JOHN F. MALLEY,
FORMER COLLECTOR OF INTERNAL REVENUE,
AND/OR
MALCOLM E. NICHOLS,
FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANTS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 4319, LAW DOCKET.

ARTHUR C. HARVEY COMPANY, PLAINTIFF,
v.
JOHN F. MALLEY,
FORMER COLLECTOR OF INTERNAL REVENUE,
AND/OR
MALCOLM E. NICHOLS,
FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANTS.

WRIT.

[L. S.] MASSACHUSETTS DISTRICT, SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts, or his Deputy, GREETING:

We command you to attach the goods or estate of John F. Malley, former Collector of Internal Revenue at Boston, and/or Malcolm E. Nichols, former Collector of Internal Revenue at Boston, of Boston, Suffolk County, in our District of Massachusetts, to the

value of one hundred and fifty thousand dollars, so that you have him or them before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March, 1930. Then and there, in our said court, to answer unto Arthur C. Harvey Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts with a usual place of business in Boston and said Commonwealth. In an action of contract, to the damage of the said Arthur C. Harvey Company (as it says), the sum of one hundred and fifty thousand dollars ($150,000), which shall then and there be made to appear, with other due damages. And have you here this writ, with your doings therein.

Witness, the Honorable JAMES M. MORTON, Jr., at Boston, the twenty-fifth day of January in the year of our Lord one thousand nine hundred and thirty.

HELEN I. TWEEDY,
Deputy Clerk.

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss. BOSTON, February 3, 1930.

Pursuant hereunto I have this day at o'clock and minutes, M., attached a chip as the property of the within named John F. Malley and thereafter on the same day I summoned the within named John F. Malley to appear at court as within commanded by giving in hand to him at Boston in said District an original summons to this writ.

WILLIAM J. KEVILLE, *United States Marshal,*
by JOHN J. HARVEY, *Deputy.*

The writ in this cause was duly entered at the March Term of this court, A. D. 1930, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, March 26, 1930, the following Declaration was filed:

DECLARATION.

[Filed March 26, 1930.]

COUNT I.

And the plaintiff says:

1. That the plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with a usual place of business in Boston, Allston District, Suffolk County in said Commonwealth.

2. That the defendant John F. Malley is now residing in Boston within the said Commonwealth and was, from the first day of December, 1913 to the thirtieth day of September, 1919, the duly qualified United States Collector of Internal Revenue for the District of Massachusetts.

3. That the defendant Malcolm E. Nichols is now residing in Boston within the said Commonwealth, and was from the first day of August, 1921 to the thirty-first day of August, 1925, the duly qualified United States Collector of Internal Revenue for the District of Massachusetts.

4. That this is an action of contract arising under the laws of the United States, providing for internal revenue, brought by the plaintiff against the defendants, both or either of them, as collectors of internal revenue, as aforesaid, to recover the sum of seventy-four thousand six hundred forty-eight and 39/100 dollars ($74,648.39) together with the interest thereon, wrongfully, erroneously and illegally collected from the plaintiff under the circumstances and in the manner hereinafter more particularly described.

5. That for the year 1917, and all prior years where it was required by law to do so, the plaintiff made its income tax returns, computed its taxes and paid the same upon the regular "calendar year" basis, as it was required to do under all of the income tax statutes, prior to the enactment of the Revenue Act of 1918.

6. That the Revenue Act of 1918 (40 Stat. 1057) expressly changed the basis upon which the tax was imposed upon corporations and required the net income to be computed and the return to be made, upon the basis of the "taxable year" as therein defined, to wit:

"Section 230. (a) That, in lieu of the taxes imposed by section 10 of the Revenue Act of 1916, as amended by the Revenue Act of 1917, and by section 4 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates. . . ."

"Section 232. That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (b) of section 212 or in section 226."

"Section 212. (a) . . . ."

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; . . . if the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

"Section 200. That when used in this title—

The term 'taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. The first taxable year, to be called the taxable year 1918, shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918; . . ."

8. That by reason of the method of accounting regularly employed by it, as aforesaid, the plaintiff was required by the foregoing provisions of the Act to make a return for the "taxable year" beginning July 1, 1917 and ending June 30, 1918, and to

compute the tax thereon in the manner provided in Section 205 (a) of the Revenue Act of 1918, to wit:

> "Section 205. (a) That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title 1 of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title 1 of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period. . . ."

9. That the plaintiff made its return for the "taxable year 1918" for the period beginning July 1, 1917 and ending June 30, 1918, and computed the tax thereon in the manner provided by Section 205 (a) as aforesaid and the true and correct amount of tax payable on the said return for the "taxable year 1918" was and is one hundred forty-six thousand ninety-eight and no/100 dollars ($146,098).

10. That the Commissioner of Internal Revenue made an original assessment of the plaintiff's tax for the said "first taxable year" under the Revenue Act of 1918 in the amount of three hundred two thousand four hundred thirty-eight and 83/100 dollars ($302,438.83), the same being made during the year 1919, of which said sum ($302,438.83) two hundred twenty-six thousand nine hundred seventy-seven and 44/100 dollars ($226,977.44) was during the said year 1919 paid by the plaintiff to the defendant Malley, collector of internal revenue as aforesaid.

11. That on or about April 9, 1923, the plaintiff filed with the defendant Malcolm E. Nichols as he was the then duly qualified collector of internal revenue at Boston, Massachusetts, as aforesaid, a claim for refund on Treasury Department Form 843 fully setting forth therein all of the grounds therefor and alleging that the said original assessment ($302,438.83) was erroneous and ex-

cessive in the amount of one hundred fifty-six thousand three hundred ninety and no/100 dollars ($156,390) and that the sum of one hundred seven thousand eight hundred twenty-six and 61/100 dollars ($107,826.61) or such greater amount as was legal should be refunded to the plaintiff on the same grounds and for the same reasons as alleged in this action.

12. That on or about May 7, 1923 the Commissioner of Internal Revenue through his duly authorized deputy allowed the plaintiff's said claim for refund and notified the plaintiff that an examination of its income tax returns, books of account and records for the "taxable year 1918" disclosed an overassessment of the tax in the amount of one hundred fifty-six thousand three hundred forty and 83/100 dollars ($156,340.83) and thereafter issued to the plaintiff the regular so-called certificate of overassessment allowing said amount ($156,340.83).

13. That of the said overassessment ($156,340.85), as is shown by the said certificate of overassment, seventy-five thousand four hundred sixty-one and 39/100 dollars ($75,461.39) was abated leaving a net overpayment in the amount of eighty thousand eight hundred seventy-nine and 44/100 dollars ($80,879.44).

14. That of the said net overpayment ($80,879.44), two thousand four hundred sixty-seven and 06/100 dollars ($2,467.06) together with the interest thereon was on or about May 21, 1924 refunded to the plaintiff; three thousand seven hundred sixty-three and 99/100 dollars ($3,763.99) was properly credited and applied to underpayments of the plaintiff's tax for the year 1920, and seventy-four thousand six hundred forty-eight and 39/100 dollars ($74,648.39) was on or about May 15, 1924, wrongfully, erroneously and illegally credited and applied by the defendant Nichols to alleged underpayments of the plaintiff's taxes for the years 1915 to 1917, inclusive, in the respective amounts as follows:

For the year 1915	$348.74
For the year 1916	4,751.03
For the year 1917	69,548.62
Total	$74,648.39

15. That the assessment and collection of any and all income taxes for the years 1915, 1916 and 1917 was in 1924 barred by Section 250 (d) of the said Revenue Act of 1918, and the credit thereto as aforesaid of the overpayment for the year 1918 was wrongful, erroneous and illegal, and the said sum ($74,648.39) together with the interest thereon was and is rightfully refundable to the plaintiff as provided in Sections 607 and 609 of the Revenue Act of 1928, to wit:

> "Section 607. Any tax (or any interest, penalty or additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."
>
> "Section 609. (a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect to such liability would be considered an overpayment under section 607."
>
> . . . . . .
>
> "(c) The provision of this section shall appiy to any credit made before or after the enactment of this act."

16. That on or about July 17, 1929, the plaintiff duly filed with the Commissioner of Internal Revenue a claim on Treasury Department Form 843 for the refund of the said sum ($74,648.39) and the interest thereon, together with a petition in support of the said claim, wherein all of the grounds both in law and in fact upon which said claim is based are set forth fully and in detail.

17. That on or about February 26, 1930, the Commissioner of Internal Revenue notified the plaintiff that the said claim had been rejected, and the said Commissioner refused and still refuses to refund to the plaintiff the said sum ($74,648.39) or any part thereof or the interest thereon, or to permit the defendants or either of them to refund said sum or any part thereof or the interest thereon to the plaintiff.

Wherefore, the plaintiff says that the defendants or either of them owes it seventy-four thousand six hundred forty-eight and 39/100 dollars ($74,648.39) together with the interest thereon at the rate of six percent per annum (6%) from the date of the said overpayment until the same shall be refunded and repaid to the plaintiff, as shown in the plaintiff's bill of particulars hereto annexed.

COUNT II.

(For the same cause of action as to the defendant Malley.)

And the plaintiff says that the defendant John F. Malley, as former collector of internal revenue, owes the plaintiff the sum of seventy-four thousand six hundred forty-eight and 39/100 dollars ($74,648.39) for money had and received by the defendant to the plaintiff's use together with interest thereon at the rate of six percent per annum (6%) until the same shall be paid, as shown in the plaintiff's bill of particulars hereto annexed.

COUNT III.

(For the same cause of action as to the defendant Nichols.)

And the plaintiff says that the defendant Malcolm E. Nichols, as former collector of internal revenue, owes the plaintiff the sum of seventy-four thousand six hundred forty-eight and 39/100 dollars ($74.648.39) for money had and received by the defendant to the plaintiff's use together with interest thereon at the rate of six percent (6%) until the same shall be paid, as shown in the plaintiff's bill of particulars hereto annexed.

O. WALKER TAYLOR,
Plaintiff's Attorney.

The defendants, by their attorneys, hereby agree that the within declaration may be filed late.

FREDERICK H. TARR,
United States Attorney,
by W. H. MARSHALL,
Assistant United States Attorney,
Attorney for Defendants.

PLAINTIFF'S BILL OF PARTICULARS.

Federal Income Tax for Taxable Year 1918.

Original Assessment in 1919—Account No. 402,091,		$302,438.83
Abated by Commissioner		75,461.39
Paid to John F. Malley, Collector, in 1919 . .		$226,977.44
Tax Liability as determined by Commissioner in 1924,		146,098.00
Overpayment for year 1918		$80,879.44

Adjustments by Nichols, Collector, in 1924.

Refunded	$2,467.06	
Properly credited to 1920 tax . .	3,763.99	6,231.05
Erroneously credited to 1915-'16-'17 taxes,		$74,648.39

This cause was thence continued from term to term to the December Term, A. D. 1930, when, to wit, January 20, 1931, the following Answers were filed within the extended time:

ANSWER OF DEFENDANT JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE.

[Filed January 20, 1931.]

Now comes the defendant John F. Malley, former collector of internal revenue, in the above entitled action and for his answer to the declaration on file herein denies each and every material allegation, item, count and particular in said declaration contained.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

ANSWER OF DEFENDANT MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE.

[Filed January 20, 1931.]

Now comes the defendant Malcolm E. Nichols, former collector of internal revenue, in the above-entitled action and for his answer to the declaration on file herein denies each and every material allegation, item, count and particular in said declaration contained.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued from term to term to the June Term, A. D. 1931, when, to wit, August 1, 1931, the following Motions of said Defendants that Plaintiff Elect Against which of the Defendants the Action Will Proceed were filed:

MOTION OF DEFENDANT JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE, THAT PLAINTIFF ELECT AGAINST WHICH OF THE DEFENDANTS THE ACTION WILL PROCEED.

[Filed August 1, 1931.]

Now comes the defendant John F. Malley, former collector of internal revenue, and moves that the plaintiff be ordered to elect against which of the defendants it will proceed, or whether plaintiff will proceed against the defendants jointly, for the following reasons:

1. There is a misjoinder of parties defendant in this action, in that a suit against a collector of internal revenue is a personal one and there can be no joint liability.

2. There is a misjoinder of causes of action.

3. The declaration herein alleges three separate and distinct causes of actions (a) against the defendant John F. Malley personally; (b) against the defendant Malcolm E. Nichols personally and

(c) against the defendants John F. Malley and Malcolm E. Nichols jointly.

4. The declaration as it now stands will not permit of an orderly trial in accordance with the rules of the common law and the practice of this court.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

MOTION OF DEFENDANT MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE, THAT PLAINTIFF ELECT AGAINST WHICH OF THE DEFENDANTS THE ACTION WILL PROCEED.

[Filed August 1, 1931.]

Now comes the defendant Malcolm E. Nichols, former collector of internal revenue, and moves that the plaintiff be ordered to elect against which of the defendants it will proceed, or whether plaintiff will proceed against the defendants jointly, for the following reasons:

1. There is a misjoinder of parties defendant in this action, in that a suit against a collector of internal revenue is a personal one, and there can be no joint liability.

2. There is a misjoinder of causes of action.

3. The declaration herein alleges three separate and distinct causes of actions (a) against the defendant Malcolm E. Nichols personally, (b) against the defendant John F. Malley personally and (c) against the defendants John F. Malley and Malcolm E. Nichols jointly.

4. The declaration as it now stands will not permit of an orderly trial in accordance with the rules of the common law and the practice of this court.

By his Attorney,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

At the same term, to wit, August 3, 1931, the following Waiver of Jury Trial and Plaintiff's Motion for Further Particulars Under Rule 41, were filed:

WAIVER OF JURY TRIAL

[Filed August 3, 1931.]

It is hereby agreed in the above-entitled action that trial by jury is waived.

O. W. TAYLOR,
Attorney for Plaintiff.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney,
Attorney for Defendants.

PLAINTIFF'S MOTION FOR FURTHER PARTICULARS UNDER RULE 41.

[Filed August 3, 1931.]

Now comes the plaintiff and moves under Rule 41 that the defendants either or both of them in the above-entitled cause be required to file within such time and upon such terms as the court may direct a further and better statement of the nature of the defenses to be relied upon in this suit and also further and better particulars of the matter stated in the motions herein filed by each of the defendants to the effect that the plaintiff elect against which of the defendants the action will proceed and as grounds for the allowance hereof the plaintiff respectfully submits the following:

1. The action arises by reason of the fact that during the year 1919 the plaintiff paid to the defendant Malley the sum of $237,063.28 on account of its income, war profits and excess profits taxes for the fiscal period ended June 30, 1918.

2. The defendant Malley resigned from the office of Collector of Internal Revenue on or about the thirteenth day of September, 1919.

3. The defendant Malcolm E. Nichols assumed his duty as Col-

lector on or about the first day of August, 1921 and held that office until the thirty-first day of August, 1925.

4. The Commissioner of Internal Revenue did not make any examination of the plaintiff's return for the fiscal year ended June 30, 1918, until after the defendant Malley had resigned.

5. On or about May 7, 1923, the Commissioner of Internal Revenue after an examination of the plaintiff's income tax return for the fiscal year ended June 30, 1918, determined that there had been an overpayment of the plaintiff's income taxes for that year in the amount of $74,648.39.

6. On May 16, 1924, the Commissioner advised the plaintiff that certificate of overassessment No. 29852 upon which the said overpayment was determined and allowed by the Commissioner had been regularly scheduled on November 15, 1923, so that the examination of the plaintiff's return, allowance of the overpayment for the 1919 taxes and the issuance of the said certificate all took place in 1923 or 1924 during the term of office of the defendant Nichols.

7. By the said certificate of overassessment No. 29852 the said overpayment of $74,648.39 which the Commissioner of Internal Revenue had determined and allowed as aforesaid for the year 1918 was credited and applied to alleged underpayment of the plaintiff's taxes for the years 1915, 1916 and 1917 as alleged in paragraph 14 of the plaintiff's declaration.

8. From the foregoing facts it is clear that the actual payment of the taxes in dispute was made to the defendant Malley and that after the determination and allowance of the overpayment the sum in dispute would have been refunded to the plaintiff as a matter of course except for the fact that said sum was credited and applied to outlawed taxes for the years 1915, 1916 and 1917 by bookkeeping entries which were made by the defendant Nichols just as illegally, as the plaintiff contends, as if the actual payments had been made to the defendant Malley.

Brady v. *United States,* 24 Fed. (2) 205.

Wherefore the plaintiff by this motion prays that the defendants

may be required to state specifically whether it relies upon the defense (1) that the outlawed taxes were collected by the defendant Malley or (2) whether it relies upon the defense that the outlawed taxes were collected by the defendant Nichols.

O. W. TAYLOR,
Attorney for the Plaintiff.

Also at the same term, to wit, August 6, 1931, issue having been joined, this cause was set down for hearing and fully heard by the court, the Honorable James A. Lowell, District Judge, sitting, the court denying said motions of both defendants that plaintiff elect against which of the defendants the action will proceed, and was taken under advisement.

This cause was thence continued to the September Term, A. D. 1931, when, to wit, October 13, 1931, an opinion of the court was announced ordering judgment for the defendants.

This cause was thence continued to the present December Term, A. D. 1931, when, to wit, December 1, 1931, a bill of exceptions was filed by the plaintiff within the extended time.

At the same term to wit, December 7, 1931, a substitute bill of exceptions, assented to, is filed by plaintiff and allowed.

Thereupon, to wit, December 7, 1931, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that the said Arthur C. Harvey Company, plaintiff, take nothing by its said writ, and that said John F. Malley, former Collector of Internal Revenue, and/or Malcolm E. Nichols, former Collector of Internal Revenue, defendants, recover of the said plaintiff their costs of suit taxed at $

PLAINTIFF'S SUBSTITUTE BILL OF EXCEPTIONS.

[Filed and Allowed December 7, 1931.]

STATEMENT OF THE CASE.

This is a suit brought to recover $74,648.39, together with interest, of an admitted overpayment of the plaintiff's income, excess-profits and war-profits taxes for the year 1918 which the plaintiff contends was wrongfully and illegally credited and applied to

alleged underpayment of the plaintiff's income taxes for the years 1915, 1916 and 1917 after the period of limitation for the assessment and collection of any taxes for those years had expired.

The plaintiff's taxes for the year 1918 were actually paid to the defendant Malley during the year 1919. The $74,648.39 overpayment was allowed by the Commissioner of Internal Revenue on December 20, 1923 (Defendants' Exhibit B). The overpayment was applied to the alleged underpayments for the earlier years by the defendant Nichols on January 31, 1924. The application of the overpayment as thus made by the defendant Nichols was approved by the Commissioner on February 18, 1924 (Defendants' Exhibit C).

The action was brought by writ which was duly served upon both defendants. The declaration was filed on March 26, 1930. After several extensions of time, allowed by the court, both defendants answered by way of general denial on January 20, 1931. Trial by jury was waived by written stipulations filed with the clerk. On August 1, 1931, both defendants filed motions that the plaintiff be required to elect against which of the defendants it would proceed and on August 3, 1931, the plaintiff filed a motion, under Rule 41, for further particulars as to the nature of the defense. The pleadings are incorporated in the record and made a part hereof by reference.

On August 6, 1931, the case came on for trial and was heard. At the opening of the trial the defendants orally requested a ruling on their motions that the plaintiff be required to elect which of the defendants the action would proceed against and the plaintiff requested a ruling on its motion for further particulars as to the nature of the defense under Rule 41 of the District Court. Both motions were argued by counsel for both sides. The court overruled the motions as to election and saved the defendants' exceptions thereto but made no specific ruling on the plaintiff's motion for further particulars under Rule 41.

In the course of the opening argument by counsel for the plaintiff the court questioned counsel for both sides and ruled as follows:

"The COURT. Well, you sue because these allocations for past years were made after the statute had run. That is your suit, is it not?

Mr. TAYLOR (for plaintiff). Yes, your Honor.

The COURT. What do you say to that? In other words, if the certificate of overassessment, whatever it is, is valid—I understand you to say it is not valid but if it is valid—then it was too late after that to use this extra money in paying the former deficiencies. Do you admit that?

Mr. CLARK (for defendants). Yes, your Honor.

The COURT. All right.

Mr. CLARK (for defendants). The first thing that we are confronted with—

The COURT. All right; I rule that Mr. Taylor has made a prima facie case. I will hear you."

Thereupon, pursuant to the above ruling of the court, defendants' counsel was allowed to put in the entire defense and argue before the plaintiff's side of the case had been fully stated, presented or argued.

STATEMENT OF THE EVIDENCE.

No witnesses were called by either side and no oral testimony was given throughout the trial. The evidence in the case consists (1) of seven written documents which were admitted as exhibits, without objection and (2) of the admissions and uncontradicted statements of facts which were made, in open court, by counsel for the respective parties, and which, by tacit agreement between the court and counsel for both sides, were accepted as matters of fact without further proof.

First: The evidence presented on behalf of the defendants:

1. As to the nature of the suit and the fact of the application of the allowed overpayment for the year 1918 to the alleged deficiencies for the years 1915, 1916 and 1917, the court asked and counsel for the defendants replied as follows:

"The COURT. How do they bring it against you? I do not quite see. In what year were the alleged wrongful acts done?

Mr. CLARK (for defendants). This is what I call a credit case. It is a situation in which the Commissioner found an overpayment for the year 1918, a fiscal year period, and at the same time he determined that there were deficiencies due for prior years, 1915, 1916 and 1917. . . . The result was that, instead of refunding the overpayment, only a very small portion of it was refunded and the balance was credited to take care of these additional assessments for the earlier years."

2. The documents offered in evidence by the defendants and accepted without objection were as follows:

Exhibit A,—The certificate of overassessment.

Exhibit B,—the schedule of overassessment.

Exhibit C,—the schedule of refunds and credits.

Exhibit D,—plaintiff's petition and claim for refund filed July 27, 1929.

Exhibit E,—plaintiff's claim for refund filed April 10, 1923.

Exhibit F,—Treasury Department letter dated December 17, 1929, to the plaintiff from David Burnet, deputy commissioner.

All of the foregoing documents are shown in full in the record and are incorporated herein by reference and made a part hereof as completely and effectually as though the entire contents thereof were herein set forth in full.

3. At the conclusion of the presentation of the documents, above referred to, counsel for the defendants asked, and counsel for the plaintiff replied, in regard to the question of whether or not the overpayment of the plaintiff's 1918 taxes was made voluntarily as follows:

"Mr. CLARK (for defendants). There is one other fact to which I think the plaintiff will probably agree, and that is, that these 1918 taxes which represent the overpayment here in question were paid by the plaintiff voluntarily during the year 1919 to Collector Malley. Is that correct, Mr. Taylor?

Mr. TAYLOR (for plaintiff). Yes.

Mr. CLARK (for defendants). That, your Honor, represents the case for the defendant. And, since your Honor has held that the

plaintiff has made out a prima facie case, may we venture to make some comment on the record?"

The foregoing statements, documents and admissions constitute all of the evidence presented in the case on behalf of the defendants.

Second: The evidence presented on behalf of the plaintiff:

1. As to the time when the Commissioner of Internal Revenue made his examination of the return and notified the plaintiff that the allowed overpayment for the year 1918, as shown by Defendants' Exhibit A, had been credited or "allocated" to the alleged deficiencies for the years 1915, 1916 and 1917, counsel for the plaintiff stated, without objection by the defendants, as follows:

"Mr. TAYLOR (for the plaintiff). The Commissioner did not examine either the original or the amended return until 1923 when all taxes for 1915, 1916 and 1917 were outlawed, and he discovered this overpayment based upon the proper return for the year 1918 and applied it to these outlawed taxes for the other years. . . ."

After some further comments the court asked and counsel for the plaintiff stated as follows:

"The COURT. Is there any question as to when it was told to you that the amount of overpayment had been allocated to the deficiency of some other earlier tax?

Mr. TAYLOR (for plaintiff). No, sir; your Honor we have the certificate of overassessment and the letters on that, which clearly show. We also have a letter allowing the overassessment which clearly shows that that was applied to these years 1915, 1916 and 1917, after the period of limitation, which was five years, had expired. There is no question on that."

2. By way of documentary evidence the plaintiff presented in evidence, without objection, Treasury Department letter dated May 7, 1923, addressed to the plaintiff and signed by E. W. Chatterton, Deputy Commissioner, the said letter being shown in full in the record, designated "Plaintiff's Exhibit 1", and being incorporated herein by reference and made a part hereof as completely

and effectually as though the entire contents thereof were herein set forth in full.

3. In addition to the above document the plaintiff offered in evidence a letter dated December 9, 1929, as follows:

"TREASURY DEPARTMENT
Bureau of Internal Revenue

Washington, Dec 9 1929

Office of The General Counsel
GC:R:C1 NAD

Mr. O. Walker Taylor, 11 Beacon Street, Boston, Massachusetts.

In re: Arthur C. Harvey Company, Incorporated,
Boston, Massachusetts.

Sir: Reference is made to the conference held in this office on November 26, 1929, in the above entitled case concerning the taxable period January 1 to June 30, 1918, and the agreement reached relative to the claim for refund of $74,648.39, filed with the Collector of Internal Revenue at Boston on July 27, 1929.

You are, accordingly, advised that this office has recommended the rejection of said claim for the reason that the information in the case indicates a tax liability for the period under consideration equal to or in excess of the amount paid and there is therefore no overpayment of any income, war-profits, or excess profits taxes within the purview of section 284 of the Revenue Act of 1926.

Respectfully,

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue

D"

As to the foregoing letter, counsel for both sides stated and the court ruled as follows:

"Mr. TAYLOR (for plaintiff). We next wish to offer this letter for the purpose of showing the ground upon which the Commissioner rejected the claim of July 17, 1929.

The COURT. Let me see it. [Letter handed to and perused by the court.] All right; I return it.

Mr. CLARK (for defendants). I have not seen that letter.

The COURT. I am not passing on it. I am waiting to see whether you object or not.

Mr. CLARK (for defendants). [After perusing.] Why, I must object to that letter. It is irrelevant and immaterial and is not a rejection letter. It is a mere communication from one counsel to another. It is not the official action of the Commissioner. And I may further say that the formal letter from the Commissioner acting upon this claim is already in the record.

The COURT. All right; I exclude it and save your exception."

4. As to the plaintiff's income tax returns for the years 1915, 1916 and 1917 counsel for the plaintiff stated, the court asked and counsel for the defendants agreed as follows:

"Mr. TAYLOR (for plaintiff). If the defendant will admit that this credit was applied more than five years after the returns for 1915, 1916 and 1917 were filed, then that would dispense with putting in those returns.

The COURT. It is agreed that the credit was applied more than five years. Is that it?

Mr. TAYLOR (for plaintiff). Yes, sir.

The COURT. All right?

Mr. CLARK (for defendants). Yes."

The foregoing is all of the evidence which was presented on behalf of the plaintiff, and together with that presented on behalf of the defendants, above referred to, constitutes all of the evidence in the case.

At the conclusion of the presentation of the evidence for both parties, the defendants severally made a written motion that judgment be entered for the defendants severally and against the plaintiff with costs.

At the conclusion of the argument the plaintiff submitted written requests for "Findings of Fact" and "Rulings of Law", which said requests together with the "plaintiff's notice to admit or deny

facts under Rule 48", therein referred to, are shown in the record and are incorporated herein and made a part hereof as fully and effectually as though the same were herein set forth in full.

At the time of the trial the court did not make any ruling on the defendants' motion for judgment or upon the plaintiff's requests for findings and rulings.

GROUNDS OF THE PLAINTIFF'S EXCEPTIONS.

On October 31, 1931, by a written opinion the court found, ruled for the defendants and issued the following order, to which the plaintiff duly excepted:

"In the case before the court no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 or 1917. As no refund could be made, the credit is not void.

Judgment for the defendants."

The plaintiff, being aggrieved, herein respectfully excepts:

1. To the order of the court directing judgment to be entered for the defendants.

2. To the refusal of the court to grant the plaintiff's requests for findings of fact and rulings of law.

3. To the refusal of the court to issue an order directing judgment to be entered for the plaintiff.

4. To the following rulings of law as contained in the said opinion of the court:

(1) That "the plaintiff is precluded from recovery by Sections 607 and 609 of the Revenue Act of 1928".

(2) That "the purpose of the Statute (Sections 607 and 609 of the Revenue Act of 1928) was to prevent the refund of payments collected by distraint after the period of limitations fixed by the Revenue Act of 1921 had run".

(3) That Sections 607 and 609 of the Revenue Act of 1928 were "not a remedial act in favor of taxpayers but was designed to help the taxing authorities".

(4) That "the evident intention" of Section 609 "is to put credits and refunds upon the same footing and provide that

payments on a barred deficiency whether made directly by the taxpayer or indirectly by credit shall not be disturbed unless a claim for the refund of taxes paid for that year had been made".

(5) That paragraph (a) of Section 609 "should be construed as if it read: 'any credit . . . shall be void if any payment in respect of such liability would be considered an overpayment as to which the taxpayer is entitled to a refund under Section 607'".

(6) That "no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 and 1917".

(7) That "as no refund could be made, the credit", in the instant case, "is not void".

5. To the failure of the court to rule, as a matter of law, that such portion of the allowed overpayment of the plaintiff's taxes for the year 1918 as was credited to alleged underpayments of the plaintiff's taxes for the years 1915, 1916 and 1917 was "absolutely void" and of no effect under Section 609 of the Revenue Act of 1928.

Wherefore the plaintiff now prays that its within substitute bill of exceptions may be allowed.

Respectfully submitted,

O. W. TAYLOR,
Attorney for the Plaintiff.

The foregoing substitute bill of exceptions is hereby assented to.

FREDERICK H. TARR,
United States Attorney,
HENRY C. CLARK,
Special Attorney, Bureau of Internal Revenue,
by J. DUKE SMITH,
Special Assistant to United States Attorney,
Attorneys for the Defendants.

Allowed December 7, 1931.

JAMES ARNOLD LOWELL,
District Judge.

PLAINTIFF'S EXHIBIT 1.

TREASURY DEPARTMENT

Washington May 7 1923

Office of Commissioner of Internal Revenue

Address Reply to Commissioner of Internal Revenue and Refer to
IT : SA : SM WAJ–A2393

Arthur C. Harvey Company, Allston District 34, Boston, Massachusetts.

Sirs : An examination of your income tax returns and of your books of account and records for the years 1918–1921 inc. discloses an additional tax liability for the years 1920 aggregating $635.43, and overassessments for the years 1918 amounting to $156,340.83 shown in detail in the attached statement.

In accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT : SA : SM : WAJ–A2393 and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been

made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such apppeal has been made, no claim in abatement of the assessment will be entertained.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

E. W. CHATTERTON, Deputy Commissioner.
By Paul F. Cain Assistant Head of Division.

STATEMENT.

IT:SA:SM WAJ–A2393

In re: Arthur C. Harvey Company, Allston District 34, Boston, Massachusetts.

Year	Additional Tax	Overassessment
1918	—	$156,340.83
1919	—	—
1920	$635.43	—
1921	—	—

Reference is made to your income and profits tax returns for the period from January 1, 1918 to June 30, 1918 and fiscal years ended June 30, 1919, 1920 and 1921.

The result of an audit of your returns for these periods, as verified by your books and accounts, is shown in detail as follows:

Net income—fiscal year ended June 30, 1918.

Net income as reported on amended return		$465,015.60
Add:		
Capital expenditures	$12,792.02	
Labor disallowed	13,775.03	
Donations	1,130.00	
Taxes	1,222.18	
Additional liberty bond interest	871.23	
Bad debts recovered but not used in reflecting book income	832.83	30,623.29
		$495,638.89

Deductions:		
Additional depreciation	$148.49	
Deductions from purchases	100.00	248.49
Net income as corrected		$495,390.40

Invested Capital.

Surplus as at June 30, 1917 as shown on Agent's report	$1,164,081.00
Add: Reduction in 1915 and 1916 tax liability	212.41
Corrected surplus	$1,164,293.41
Capital stock	300,000.00
Capital stock and surplus at the beginning of year	$1,464,293.41

Changes during the Year.

Dividends:			
7/1/17	$5,250.00 365 days	$5,250.00	
7/25/17	5,000.00 341 days	4,671.23	
8/25/18	5,000.00 310 days	4,246.58	
Income tax:			
6/15/18	$340,141.51 16 days	14,910.31	
Total changes during the year			$29,078.12
Capital stock and surplus at the beginning of year			$1,464,293.41
Less: Total changes during the year			29,078.12
			$1,435,215.29
Deduction on account of inadmissibles, .006644			9,535.56
Invested capital, taxable year			$1,425,579.73
Average pre-war capital			200,867.60
Increase			$1,224.812.13

Excess profits and war profits credit.

8% of Invested Capital	$114,054.38
Exemption	3,000.38
Total tax profits credit	$117,054.38

Average pre-war income	$38,607.57
Plus 10% of increase	122,481.21
Exemption	3,000.00
Total war profits credit	$164,088.78

Computation of Taxes.

Not over	Income	Deduction	Balance	Rate	Tax.
20%	$285,135.95	$117,054.38	$168,081.57	30%	$50,424.47
Over 20%	210,254.45		210,254.45	65%	136,665.39
	$495,390.40	$117,054.38	$378,336.02		$187,089.86

War Profits Tax

Net income	$495,390.40		
Less: Credit	164,088.78		
Balance taxable at 80%	$321,301.62	$265,041.30	
Less: Excess profits tax		187,089.86	77,951.44
Total excess profits and war profits taxes			$265,041.30

Computation of Total Tax.

Excess profits and war profits taxes			$265,041.30
Net income as corrected		$495,390.40	
Less:			
Interest on U. S. obligations	$2,060.00		
Profits tax	265,041.30		
Exemption	2,000.00	269,101.30	
Taxable at 12%		$226,289.10	27,154.69
			$292,195.99
One-half, for six months period			$146,098.00
Previously assessed:			
(Original assessment, Account #402091)			$302,438.83
Tax liability			146,098.00
Indicating an overassessment of			$156,340.83

Fiscal Year Ended June 30, 1919.

The audit of the Agent's report for the periods from July 1, 1918 to June 30, 1919, results in a net loss, therefore there is no tax due.

Fiscal year ended June 30, 1920.

Net income as returned		$438,443.20
Add:		
Error in reconciliation	$ .02.	
Expenses	435.00.	
Depreciation disallowed	2,435.23.	
Loss disallowed	409.60.	3,279.85
Net income as corrected		$441,723.05

Invested Capital.

Surplus, June 30, 1919, as shown on the Agent's report		$976,080.35
Add:		
Reduction in tax liability 1915 and 1916	$212.41	
1917	18,685.87	
Fiscal year ended June 30, 1918 (1/2)	18.32	18,916.60
Corrected surplus		$994,996.95
Capital stock		300,000.00
Capital stock and surplus at beginning of the year		$1,294,996.95

Changes during the Year.

Dividends: 7/1/19	$5,250.00 366 days	$5,250.00	
Income tax:			
1918, 7/1/19	$73,049.00 366 days	73,049.00	
		$78,299.00	78,299.00
			$1,216,697.95
Less: Deduction for inadmissibles	.00733		8,918.40
Invested capital as corrected			$1,207,779.55

Excess Profits Credit.

8% of invested capital	$96,622.36
Specific exemption	3,000.00
Total	$99,622.36

Computation of Tax.

Not over	Income	Deduction	Balance	Rate	Tax
20%	$241,555.91	$99,622.36	$141,933.55	20%	$28,386.71
20%	200,167.14		200,167.14	40%	80,066.86
Totals	$441,723.05	$99,622.36	$342,100.69		$108,453.57

Income Tax.

Net income		$441,723.05	
Less:			
United States Interest	$388.49		
Excess profits tax	108,453.57		
Exemption	2,000.00	110.842.06	
Taxable at 10%		$330,880.99	33,088.10
Total tax liability			$141,541.67
Previously assessed:			
Original, Account #427011			140,906.24
Indicating an additional assessment of			$635.43

Fiscal year ended June 30, 1931.

Inasmuch as the operations for this period result in a net loss there is no tax due.

DEFENDANTS' EXHIBIT A.

United States of America Treasury Department
Washington, May 13, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of Certificate of Overassessment, allowing $156,340.83 for the period from January 1 to June 30, 1918, *in re:* Arthur C. Harvey Company, Boston, Massachusetts, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD,
City Clerk, Treasury Department.

[SEAL]

Mc W Bamr E. H. FFF CMC.

TREASURY DEPARTMENT

WASHINGTON 1211

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

INCOME TAX UNIT

IT:SA:SK
WAJ-A2595

CERTIFICATE OF
OVERASSESSMENT

Number: 29852

Allowed: $ 156,340.83

Rejected: $

Arthur C. Harvey Company,
Allston District 34,
Boston, Mass.

Sirs:

An audit of the return for period from Jan. 1 to June 30, 1918, Form 1120 of the above-named taxpayer indicates that the amount of tax assessed for this year was in excess of the amount due:

Tax assessed, Original	#402091	$502,438.83
Tax liability		146,098.00
Overassessment indicated		$156,340.83

The manner of arriving at this overassessment is being conveyed to you in a separate communication.

Office Record, Income Tax Unit:

The amount of the overassessment shown on this certificate is to be scheduled and forwarded to the Collector of Internal Revenue for the appropriate district, to be applied as abatement, credit, or refund as the condition of the taxpayer's account may warrant.

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit, from ~~the date~~ six months after the date of filing to the date of allowance of the claim, but on the balance as credit when required prior to the filing of the claim.

RECORD OF AUDIT AND REVIEW.

(Signature) Date

Return audited: Wm Harvey 4-29-23

Reviewed (Unit): Allan H. Watson JUN 23 1923

REVIEWED: Saw Adams 5/1/23
REVIEW SECTION.

Approved: A. Alexander
HEAD OF DIVISION.

Approved: Logan Marshall 12/29/23

COMMITTEE.

(TTT6-C) Revised April, 1922

rgh-1

Schedule Number: 7778
District: 6194.99
Boston Mass

ACTION	INITIALS	DATE
Return Stamped	SWPIF	5-23
Schedule Checked		

#74648.35 credited to unpaid taxes. To be required per Rec 609 Oct 1919 Memo to A + C 9/15/19 RF.

This action cancelled by G.C. Rec memo RF 2/24/20 dated 1/9/19. Refund not allowed.

RECORD OF ASSESSMENTS AND PAYMENTS

(Entries to be made by the Collector according to instructions.)

	Character of assessment and period covered.	List.	Year.	Month.	Account No. on Page.	Account No. on Line.	Amount assessed.	Payments. Date paid.	Payments. Amount paid.
ORIGINAL ASSESSMENT	1918	Annual	1919		4020	91	302524 67	3-19-19	60 000.00
								7-1-19	9,466.78
								9/17/19	72596.50
							Alt. on this Sch.	#7978	75 461.39
ADDITIONAL ASSESSMENT									

Tax { was / was not } paid under "specific" (written) protest.
If so paid, Collector should attach such protest to this certificate.

The records of this office are as given above.

Date certified Collector's Office

Collector of Internal Revenue.

Stamp here.

$ 48563.39 $ 3102.49 By

Deputy Collector.

Claim Filed Date: 10/16/20

CALCULATION OF INTEREST ALLOWANCE

(Entries not to be made by the Collector.)

Dates:	Year.	Month.	Day.	Year.	Month.	Day.	Year.	Month.	Day.	Year.	Month.	Day.
1. Allowance, refund or credit	23	3	30	23	12	20						
2. Payment of tax												
3. Six months from filing claim	21	4	16	21	4	16						
4. Period: Interest allowance	1	11	14	2	8	4						
5. Amount of refund												
6. Amount of credit												
7. Interest allowance	5696	55		498	44							
8. Totals (including interest)												
A	5696	55										
	498	44										
TOTAL REFUNDABLE	6194	99										

Date of computation 2-9-24

MAS

Computer.

(Stamp here.)

D—116660

f2

United States of America
General Accounting Office

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered B-1 and B-2, are true copies of the official documents now on file in the General Accounting Office in the following case: Arthur C. Harvey Company.

In witness whereof, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 19th day of November, in the year 1930, at Washington.

J. R. M. CAIN,
[SEAL] Comptroller General of the United States.

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM 7805
Form approved by Comptroller General
Feb. 9, 1923

This schedule must be executed and all required steps taken without delay.
COMMISSIONER OF INTERNAL REVENUE.

SCHEDULE OF OVERASSESSMENTS AND ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY

C-11891

C-11891

INCOME TAX UNIT

C-11891 District

AUTHORIZATION OF COMMISSIONER

$90987.15

MASSACHUSETTS

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The returns of the taxpayers listed herein, together with their claims (if any) and appropriate supporting evidence, have been carefully examined and the tax liability of the respective taxpayers has been determined in accordance with the available facts and the law. The overassessments or reductions in tax liability appearing in column 4 are accordingly recommended for allowance.

Date DEC 20 1923

Deputy Commissioner.

To the Collector ..... *District of* MASSACHUSETTS

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Refund" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date DEC 20 1923

Commissioner of Internal Revenue.

CERTIFICATE OF COLLEC

To the Commissioner of Internal Reve

The items in this schedule have been the accounts of the respective taxpayers the amounts indicated have been applied and credits on their accounts.

The amounts of overpayment and refundable have been determined to be

Date January 31, 192

Collector ..... District of

(Entries to be made by the Collector)

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Overassessments or Reductions of Tax Liability (Amount) (4)	List, Page and Line, or Account Number (5)	Taxable Year (6)	Abatement (Amount) (7)	Overpayment (Amount) (8)	Credit (Amount carried to Form 7805-A) (9)	Account Credited: List, Page, and Line (10)	Due Date of Items Against Which Credit Was Made (11)	Refund (12)
32	29852	Harvey Co., Arthur C.	156,340 83	1/1 to 6/30/18		75461 39	80879 44	see distribution of overpayment on page			
								26085 00	Feb.(19 P12812	6-6-19	
32	29852	Harvey Co., Arthur C.						3128 56	Oct.'20 #427011	9-15-20	
								348 74	Mar.'23 P15811	3-30-23	
								4751 03	" " 158 6	"	
								43463 62	" " 158 2	"	
								636 43	Dec.'23 P4413	12820-23	

TREASURY DEPARTMENT
U. S. INTERNAL REVENUE SERVICE
FORM 7805-A
Form approved by Comptroller General
Feb. 6, 1923

IMMEDIATE
This schedule must be executed and all required steps taken without delay.
COMMISSIONER OF INTERNAL REVENUE.

C-22864-B-18

SCHEDULE OF REFUNDS AND CREDITS

ILLEGAL OR ERRONEOUS COLLECTIONS

INCOME TAX UNIT

ORIGINAL
Voucher to General Accounting Office

C-22864-B

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items hereon are related as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named discloses such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit.

Date January 31, 1924.

Collector, ... District of Massachusetts.

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due

Date FEB 18 1924

Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made of the amounts shown in column 7.

Date FEB 18 1924

Commissioner of Internal Revenue.

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Net Amount Refundable (4)	Amount Credited (5)	(Not to be used by Collector) Interest Accrued (6)	Total Refundable (7)	Date of Prior Payment of Tax Collected Under Protest or Duress (8)	(Not to be used by Collector) Refunding Taxes Illegally Collected 1924 and Prior Years (9)	——— (10)	19..... (11)
B-2 32	29852	Harvey Co., Arthur C.	2467 06	78412 88	6194 [illegible]	662 05	9-17-19	8662 05		

required steps taken without delay.
COMMISSIONER OF INTERNAL REVENUE.

-11891

AND

ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY C-11891

Sheet 1 of 3 sheets

INCOME TAX UNIT

District of MASSACHUSETTS

AUTHORIZATION OF COMMISSIONER

+90987.15

To the Collector ..... District of MASSACHUSETTS

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Refund" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7885-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7885-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7885-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date DEC 20 1923

[signature] Commissioner of Internal Revenue.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date January 31, 1924.

[signature] Collector ..... District of Mass.

ACCOUNTS UNIT

Stated and entered

INITIALS	DATE
T	2/27/24

(Entries to be made by the Collector)

368m cases

ADDRESS OF TAXPAYER (3)	OVERASSESSMENTS OR REDUCTIONS OF TAX LIABILITY (AMOUNT) (4)	LIST, PAGE AND LINE, OR ACCOUNT NUMBER (5)	TAXABLE YEAR (6)	ABATEMENT (AMOUNT) (7)	OVERPAYMENT (AMOUNT) (9)	CREDIT (AMOUNT CARRIED TO FORM 7885-A) (8)	ACCOUNT CREDITED; LIST, PAGE, AND LINE (10)	DUE DATE OF ITEMS AGAINST WHICH CREDIT WAS MADE (11)	NET AMOUNT REFUNDABLE CARRIED TO FORM 7885-A (12)	REMARKS (13)
Arthur C.	156,340 83	1/1 to 6/30/18		75461 39	80879 44	see distribution of overpayment on page 43.				368-M Items.
						26085 00	Feb.'19 P128L2	6-6-19		
rthur C.						3128 56	Oct.'20 #427011	9-15-20	2467 06	
						348 74	Mar.'23 P158L1	3-30-23		
						4751 03	" " 158 9	"		
						43463 62	" " 158 2	"		
						635 43	Dec.'23 P44L3	12820-23		

IMMEDIATE

This schedule must be executed and all required steps taken without delay.

COMMISSIONER OF INTERNAL REVENUE.

64-B-16 14 S

ATE OF COLLECTOR

refund or credit on an original schedule (bearing the same number) ve been approved and allowed by the Commissioner of Internal Revenue. ers named disclosed such items to be the portions of such previously bject to refund or credit.

[signature] Collector, ... District of Massachusetts.

SCHEDULE OF REFUNDS AND CREDITS

ILLEGAL OR ERRONEOUS COLLECTIONS

INCOME TAX UNIT

ORIGINAL

Voucher to General Accounting Office

C-22864-B-16

Schedule No. IT-R 7728

Sheet 1 of 2 Sheets.

Dist. of Massachusetts

D. C. Voucher No. 1332

UNIT	NOTATIONS	DATE
Ast'd	M	2/29/24

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due

Date FEB 18 1924

[signature] Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made of the amounts shown in column 7.

Date FEB 16 1924

[signature] Commissioner of Internal Revenue.

NO. ADDRESS OF TAXPAYER (3)	NET AMOUNT REFUNDABLE (4)	AMOUNT CREDITED (5)	(Not to be filled in by Collector) INTEREST ACCRUED (6)	TOTAL REFUNDABLE (7)	DATE OF FINAL PAYMENT OF TAXES CREDITED OR OF ASSESSMENT OF TAXES REFUNDED (8)	(Not to be filled in by Collector) REFUNDING TAXES ILLEGALLY COLLECTED 1924 and Prior Years (9)	19.... (10)	19.... (11)	PAID BY DISBURSING CLERK, TREAS. DEPT., BY CHECKS DATED APR 12 1924 NUMBERED AS FOLLOWS (12)	REMARKS (13)
Arthur C.	2467 06	78412 88	6194 9	662 05	9-17-19	8662 05			414117	

DEFENDANTS' EXHIBIT D.

United States of America Treasury Department

Washington July 31, 1931.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of Claim for Refund of $74,648.39 with interest, income tax for 1918, (with petition attached), filed by Arthur C. Harvey Company, Incorporated, Boston, Massachusetts; Copy of letter dated December 17, 1929, to Arthur C. Harvey Company, Incorporated, Boston, Massachusetts, from David Burnet, Deputy Commissioner the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above given.

By direction of the Secretary

F. A. BIRGFELD,

[SEAL] Chief Clerk, Treasury Department.

H. C. C. EF W W Bamr RES CMC MM

(Execute Separate Form for Each Tax Period)

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

State of Massachusetts 1211 129730

County of Suffolk ss:

(Name of taxpayer or purchaser of stamps.) Arthur C. Harvey Company, Incorporated.

(Residence—give street and number as well as city or town and State.) Allston District No. 34.

(Business address.) Boston, Massachusetts

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From Jan. 1	1918
To Dec. 31	1918

1. Business in which engaged Steel
2. Character of assessment or tax Income
3. Amount of assessment or stamps purchased Overpayment allowed for year 1918 $80,879.44
6. Amount to be refunded (or such greater amount as is legally refundable) with interest $74,648.39
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) November 15, 1923.
8. District in which return (if any) was filed Massachusetts—Schedule No. 7778

Deponent verily believes that this application should be allowed for the following reasons:

First: By Certificate of Overassessment No. 29852, listed on District of Massachusetts Schedule No. 7778, November 15, 1923, the Company was allowed an overassessment for 1918 in the amount of $156,340.83 of which $75,461.39 was abated making the net overpayment allowed $80,879.44, of which the amount herein claimed ($74,648.39) was erroneously credited to underassessments for the years 1915, 1916, and 1917, the assessment and collection of which was barred by Section 250 (d) of the Revenue Act of 1921. See Peerless Paper Box Co. *v.* Routzahn, 22 Fed. (2nd) 459; and Sections 607 and 609 of the Revenue Act of 1928.

Second: A petition is also filed herewith wherein the facts, authorities and the grounds upon which this claim should be allowed are more fully set forth.

ARTHUR C. HARVEY COMPANY, INC.

[SEAL] By: Edward T. Edwards Treasurer.

Sworn to and subscribed before me this 17th day of July, 1929.

Edwin C. Burbank

]SEAL] Notary Public

[Stamped:]

Received Jul 24 1929 Claims Control Section
Received Boston Mass Jul 27 1929 Claim Div. Int. Revenue
2109672 Jul 24 1929

Certificates

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered. Corp Inc. 1918 List. Reg Year. 1919 Month. Led 40

Page. 402 Line. 091. T W WHITE

Collector of Internal Revenue.

Amount rejected $74,648.39

[Stamped:]

Rejected 16096 I. T. Schedule

IT:SA:SM WAJA-2393

Arthur C. Harvey Company, Inc. Allston District #34, Boston, Massachusetts.

In re: Overpayment of taxes for 1918 erroneously credited to outlawed underpayments.

PETITION WITH SUPPORTING FACTS, LAW AND AUTHORITIES.

To the Commissioner of Internal Revenue, Washington, D. C.

Sirs:—The above named Arthur C. Harvey Company, of Boston, Massachusetts, hereby respectfully petitions for, claims or demands, the payment or refund of $74,648.39 together with the interest thereon, representing that portion of the overpayment of its tax allowed for the year 1918 which was erroneously and illegally credited to underpayments for the years 1915, 1916, and 1917, and in support of its petition respectfully submits the following:

The Facts.

By Certificate of Overassessment No. 29,852, listed November 15, 1923, Schedule No. 7778, the Company was allowed an overassessment for the year 1918 in the amount of $156,340.83 of which $75,461.39 was abated making the net overpayment allowed $80,879.44. Of this overpayment $2,467.06 was refunded; $3,763.99 was properly credited to underassessments for the year 1920, and $74,648.39 was erroneously credited to underpayments for prior years as follows:

To additional assessment for year	1915—	$348.74
" " " " "	1916—	4,751.03
" " " " "	1917—	69,548.62
Total		$74,648.39

Law Authorities and Comments.

The petitioner contends that at the time the foregoing credits were made, the collection of taxes for the years 1915, 1916, and 1917 was entirely barred by the statute of limitations, whether such collection was made by actual payment, by credit or otherwise.

First: The Revenue Act of 1921, Section 250 (d) which is pertinent to this case provides as follows:

> "The amount of income, excess profits or war profits taxes due under any return made under this act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits or war profits tax acts . . . shall be determined and assessed within five years after the return was filed, unless the Commissioner and the tax-payer consent in writing to a later determination, assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under income, excess profits or war profits tax acts shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act; . . .."

In the case of Bowers Collector, *vs.* New York & Albany Lighterage Company, 273 U. S. 346, the Supreme Court interpreted this section of the Act to mean that both assessment and collection must be made within five years, and that if either the assessment or the collection was made beyond that limitation, there was error. See also Seaman *vs.* Bowers, 297 Fed. 371.

Second: The same principle of law holds where the Commissioner through the Collector of Internal Revenue, applies or credits an allowed overpayment for one year to a deficiency or underpayment for a prior year the assessment or collection of which is barred. In Peerless Paper Box Company *vs.* Routzahn, 22 Fed. (2) 459, the Court said:

> "My opinion is that the statute had run against the collection of the second additional tax assessment for 1917, and that the action of the Collector in October, 1924, crediting the refund for 1918 against the second additional assessment for 1917 was tantamount to the method of tax collection held by the Supreme Court to be prohibited after the expiration of the time limited by statute. Bowers *vs.* New York & Albany Lighterage Co., 273 U. S. 346, 47 S. Ct. 389; Toxaway Mills *vs.* United States, 273 U. S. 781, 4 S. Ct. 471."

Also in the cases of Brady *vs.* United States and Lyman *vs.* Sam, 24 Fed. (2) 205, both of which were tried at the same time, November 15, 1927, and are reported together, the Court said:

> "In the Brady Case a refund owed to a taxpayer was not paid to him, but was credited against an uncollected tax outlawed by the statute of limitations then in force.
>
> In the Lyman Case collection of an outlawed tax was enforced by process of distraint.
>
> Both of them are governed by Bowers *v.* N. Y. & Albany Co., 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676, recently decided by the Supreme Court of the United States.
>
> The Brady tax was 'collected' by the bookkeeping entry just as illegally as if there had been a suit or a process of distraint. Peerless Box Co. *v.* Routzahn, 22 F. (2d) 459."

Third: The principles of law promulgated in the cases cited above were clearly and expressly embodied in the Revenue Act of 1928, which provides as follows

> "Section 607. Any tax (or any interest, penalty or additional amount, or addition to such tax) assessed or paid

(whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Section 609. (a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect to such liability would be considered an overpayment under section 607."

"(c) The provision of this section shall apply to any credit made before or after the enactment of this act."

In G. C. M. 4879 the general counsel of the Bureau of Internal Revenue interpreted the foregoing provisions of the Act of 1928 to mean that any credit applied to an outlawed tax is void and that any amount so applied shall be refunded or paid to the taxpayer as an overpayment of the tax for the taxable year with respect to which such overpayment was allowed.

Conclusion.

From the foregoing and from the records in this case it can clearly be seen that the Bureau erred in applying the overpayment for the year 1919 to the underpayment for the years 1915, 1916, and 1917 and it is respectfully submitted that the amount herein petitioned for ($74,648.39) should be paid or refunded to the petitioner. A claim for refund for the same amount on Form 843 is filed and submitted herewith.

Respectfully submitted,

ARTHUR C. HARVEY CO., INC.

[SEAL] By: Edward T. Edwards, Treasurer.

Commonwealth of Massachusetts.

Suffolk, ss.

Sworn to and subscribed before me this nineteenth day of July 1929. Edward C. Burbank

Notary Public.

My commission expires Dec. 13, 1932

IT:AR:F FBR

Arthur C. Harvey Company, Incorporated, Allston District #34, Boston, Massachusetts.

Sirs: Your claim for refund of $74,648.39 representing income and profits taxes for the year 1918, alleged to have been erroneously credited against the tax liability for the years 1915, 1916 and 1917, has been examined and will be rejected for the following reasons:

The amount you now seek to recover is a portion of an overassessment of $156,340.83 allowed for the six months' period ended June 30, 1918 on a schedule signed by the Commissioner December 20, 1923 and the amount $74,648.39 thereof was applied against the tax liability for the years 1915, 1916 and 1917. Your contention is that the credit was made after the expiration of the statutory collection period. You are advised that the records of this office indicate that your return for the period ended June 30, 1918 disclosed a tax liability of $302,524.67. Prior to 1918 the returns were filed on the calendar year basis. The corporation keep its books on a fiscal year basis ended June 30. The return for the six months' period above-mentioned apparently was filed to adjust the filing basis to a fiscal year and the tax was assessed on that basis. In the computation producing the overassessment of $156,340.83 the tax liability was computed upon the basis of the net income for the entire year taking 6/12 thereof as representing the tax for the six months' period ended June 30, 1918.

The proper method for computing the income for the six months' period in question is in accordance with the original return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84 and appeal of Coghlen Electric Company, 3 B. T. A. 1071 and Section 226 of the Revenue Act of 1918).

In a conference in the General Counsels' office you stated that you did not wish to furnish any further information to substantiate the contention that the income reported on the term filed was erroneous, therefore your return will be accepted as filed.

[Stamped:]
Rejected 16096 I. T. Schedule.
Dec 17 1929
Received Dec 17 1929 Claims Control Section

It is accordingly held that the overassessment was erroneously allowed and, therefore, that portion of the overassessment which has not yet been refunded, having been credited against the tax liability for prior years, will not be refunded at this time. Your claim will be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner.

Respectfully,

DAVID BURNET Deputy Commissioner.
By H. B. Robinson Head of Division.

DEFENDANTS' EXHIBIT E.

United States of America Treasury Department
Washington May 13, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of $107,826.61 and Credit of $43,463.62 to be applied against an unpaid assessment of $43,463.62 for 1917. Income and War Profits Tax for the six months period ending June 30, 1918, (with statement attached), filed by Arthur C. Harvey Company, Boston, Massachusetts, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD,
Chief Clerk, Treasury Department.

[SEAL]

MC W W Bamr EH FFT CMC

Dept. Letter 2–2–23 Add'l 1917 List March 15 8-2

Claim for Credit Against Outstanding Assessments
Refund of Taxes Illegally Collected

State of Massachusetts

County of Suffolk ss:

(Name of taxpayer or purchaser of stamps.) Arthur C. Harvey Company

(Business address.) Allston District #34 Boston, Mass.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From Jan. 1	1918
To June 30	1918

1. Business in which engaged Iron & Steel
2. Character of assessment or tax Income, War profits
3. Amount of assessment or stamps purchased $302,524.67
4. Reduction of Tax Liability requested (Income and Profits Tax) 43,463.62
6. Amount to be refunded (or such greater amount as is legally refundable) $107,826.61
8. District in which return (if any) was filed 3rd Mass.
9. District in which unpaid assessment appears 3rd Mass.
10. Amount of overpayment claimed as credit . $43,463.62
11. Unpaid assessment against which credit is asked, period from Jan. 1, 1917 to Dec. 31, 1917 . $43,463.62

ARTHUR C. HARVEY Co.
CHARLES W. HENDERSON Jr. Vice President.

Sworn to and subscribed before me this 9th day of April, 1923

Thomas M. Elcock

Notary Public.

[Stamped:]

Recorded May 2 1923 Claims Control Section
Received Claim Dept Apr. 10 1923 3rd District Mass.

Certificates

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered. Corp Inc. 6-30-18
Year. 1919 # 402091

MALCOLM E. NICHOLS

Collector of Internal Revenue.

[Stamped:]

Adjusted under certificate of overassessment No. 29852 SASM Section June 23/23 Allen H Watson

This combination claim of credit and refund is filed as result of an examination by the Revenue Agent and subsequent adjustments by the Bureau at Washington.

The Bureau at Washington finally determined that there was additional tax due as follows:

Calendar Year 1915	$348.74	
Calendar Year 1916	4,751.03	
Calendar Year 1917	43,463.62	$48,563.39

The Agent's report and Treasury Department letter dated August 16, 1922 also indicated that there was an over-assessment for the period ended June 30, 1918 of $156,390.00. Separate claims for credit are now being filed to cover the 1915 and 1916 additional tax. The amount of credit asked in this claim covers the additional tax for 1917. The amount of the refund requested in this claim $107,826.61 is determined as follows:

Tax Assessed for period ended June 30, 1918		$302,524.67
Tax per Agent's Report		146,134.67
Overassessment per Agent's Report and Department Letter August 16, 1922		156,390.00
Claims for credit now being filed:		
1915	$348.74	
1916	4,751.03	
1917	43,463.62	
	48,563.39	48,563.39
Claim for Refund		107,826.61

There has previously been filed certain claims for abatement in reference to the tax for the period ended June 30, 1918, and we believe that in final settlement these claims for abatement would be offset against this claim for refund.

DEFENDANTS' EXHIBIT F.

TREASURY DEPARTMENT

Office of Commissioner of Internal Revenue

Washington Dec 17 1929

Address reply to Commissioner of Internal Revenue and refer to
IT:AR:F FBR

Arthur C. Harvey Company, Incorporated, Allston District # 34, Boston, Massachusetts.

Sirs: Your claim for refund of $74,648.39 representing income and profits taxes for the year 1918, alleged to have been erroneously credited against the tax liability for the years 1915, 1916 and 1917, has been examined and will be rejected for the following reasons:

The amount you now seek to recover is a portion of an overassessment of $156,340.83 allowed for the six months' period ended June 30, 1918 on a schedule signed by the Commissioner December 20, 1923 and the amount $74,648.39 thereof was applied

against the tax liability for the years 1915, 1916 and 1917. Your contention is that the credit was made after the expiration of the statutory collection period. You are advised that the records of this office indicate that your return for the period ended June 30, 1918 disclosed a tax liability of $302,524.67. Prior to 1918 the returns were filed on the calendar year basis. The corporation keeps its books on a fiscal year basis ended June 30. The return for the six months' period above-mentioned apparently was filed to adjust the filing basis to a fiscal year and the tax was assessed on that basis. In the computation producing the overassessment of $156,340.83 the tax liability was computed under the basis of the net income for the entire year taking 6/12 thereof as representing the tax for the six months' period ended June 30, 1918.

The proper method for computing the income for the six months' period in question is in accordance with the original return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84 and appeal of Coghlen Electric Company, 3 B. T. A. 1071 and Section 226 of the Revenue Act of 1918).

In a conference in the General Counsels' office you stated that you did not wish to furnish any further information to substantiate the contention that the income reported on the term filed was erroneous, therefore, your return will be accepted as filed.

It is accordingly held that the overassessment was erroneously allowed and, therefore, that portion of the overassessment which has not yet been refunded, having been credited against the tax liability for prior years, will not be refunded at this time. Your claim will be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner.

Respectfully,

DAVID BURNET, Deputy Commissioner.

By H. B. Robinson Head of Division.

PLAINTIFF'S REQUEST FOR FINDINGS AND RULINGS.

The plaintiff respectfully requests the Honorable Court to find as matters of fact and rule as matters of law in the above-entitled case as follows:

FINDINGS OF FACT.

1. The plaintiff respectfully requests that the court finds as matters of fact for the purposes of this suit all and each of the several facts contained in the plaintiff's notice to admit or deny facts under Rule 48 and in addition thereto the following specific facts:

2. That at the time $348.74 of the overpayment of the plaintiff's 1918 taxes was applied to an alleged underpayment for the year 1915 more than five years had expired after the filing of the plaintiff's return for the year 1915.

3. That at the time $471.03 of the overpayment of the plaintiff's income taxes for the year 1918 was applied to an alleged underpayment for the year 1916, more than five years had expired after the filing of the plaintiff's return for the year 1915.

4. That at the time $69,548.62 of the overpayment of the plaintiff's 1918 taxes was applied to an alleged underpayment for the year 1917, more than five years had expired after the filing of the plaintiff's return for the year 1917.

RULINGS OF LAW.

1. That at the time $348.74 of the overpayment of the plaintiff's 1918 taxes was applied to an alleged underpayment for the year 1915 the determination, assessment and collection of all taxes for the year 1915 was barred by the provisions of Section 250 (d) of the Revenue Act of 1921.

2. That at the time $471.03 of the overpayment of the plaintiff's income taxes for the year 1918 was applied to an alleged underpayment for the year 1916 the determination, assessment and collection of all taxes for the year 1916 was barred by the provisions of Section 250 (d) of the Revenue Act of 1921.

3. That at the time $69,548.62 of the overpayment of the plain-

tiff's 1918 taxes was applied to an alleged underpayment for the year 1917 the determination, assessment and collection of all taxes for the year 1917 was barred by the provisions of Section 250 (d) of the Revenue Act of 1921.

4. That upon all the facts of the case there is no warrant for making any distinction as to whether or not the suit is brought against the Collector of Internal Revenue individually or against the United States. See *Graham* v. *Goodcell*, 51 Supreme Court, 191, 192, where Mr. Justice Hughes says:

> "Nor is there any warrant for making a distinction in this respect between suits which had been brought against the Collector individually and those pending against the United States."

5. That upon all of the facts of the case both the defendant Malley and the defendant Nichols participated in the illegal transaction whereby the plaintiff was deprived of sums of money to which it was rightfully entitled by law and as to each of them there exists probable cause whereon this suit may lie as provided in Section 842 of Title 28 of the Judicial Code (R. S. 989).

6. That upon all the law of the case the application and credit by the Commissioner of Internal Revenue and/or the defendants of the sum of $74,648.39 to the alleged underpayments of the plaintiff's income taxes for the years 1915, 1916 and 1917 constituted an overpayment which should be refunded to the plaintiff as provided in Sections 607 and 609 of the Revenue Act of 1928.

O. W. TAYLOR,
Attorney for the Plaintiff.

PLAINTIFF'S NOTICE TO ADMIT OR DENY FACTS UNDER RULE 48.

[Filed July 25, 1931.]

Take notice that the plaintiff in this case requires the defendant to admit or deny, for the purpose of this case only, the several facts respectively hereunder specified; and the defendants are hereby required, within the time provided in Rule 48 of the Dis-

trict Court of the United States for the District of Massachusetts to admit or deny the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this case.

A copy of this notice has been served upon the United States Attorney at Boston and a copy has also been forwarded to C. M. Charest, Esq., General Counsel, United States Bureau of Internal Revenue, c/o H. C. Clark, Special Attorney, United States Bureau of Internal Revenue, by registered mail.

Dated and filed with the clerk this twenty-fifth day of July, 1931.

O. W. TAYLOR,
Attorney for Plaintiff.

To FREDERICK H. TARR, Esq., *United States Attorney,*
J. DUKE SMITH, Esq.,
Special Assistant to United States Attorney,
C. M. CHAREST, Esq.,
General Counsel, United States Bureau of Internal Revenue,
H. C. CLARK, Esq.,
Special Attorney, United States Bureau of Internal Revenue,
Attorneys for Defendants.

The facts, the admission or denial of which is required, are the following:

1. The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts with a usual place of business in Boston, Allston District, Suffolk County in said Commonwealth.

2. The defendant John F. Malley is now residing in Boston within the said Commonwealth and was, from the first day of December, 1913 to the thirteenth day of September, 1919, the duly qualified United States Collector of Internal Revenue for the District of Massachusetes.

3. The defendant Malcolm E. Nichols is now residing in Boston, within the said Commonwealth, and was from the first day of August, 1921 to the thirty-first day of August, 1925, the duly qualified United States Collector of Internal Revenue for the District of Massachusetts.

4. The plaintiff seasonably filed its income tax returns for the years 1915, 1916 and 1917, said returns being made upon the basis of the calendar year and thereupon paid to the Collector of Internal Revenue at Boston, Massachusetts, the taxes shown thereon, said returns having been filed on or about March 15, 1916, 1917 and 1918 respectively.

5. The plaintiff has always kept its books of account on the basis of the fiscal year ending June 30 of each and every year and never under the Act of 1918 or any prior or subsequent Revenue Act applied to the Commissioner of Internal Revenue to change its method of accounting from the "fiscal" to the calendar year basis.

6. The plaintiff never at any time filed any bond, claim in abatement or waiver of the statutory period of limitations provided for the determination, assessment and collection of its taxes for the years 1915, 1916 and 1917.

7. On or about June 15, 1919, the plaintiff filed its return for the year 1918 and of the total tax indicated thereon $227,063.28 was paid by the plaintiff to the defendant Malley as Collector of Internal Revenue in three installments on dates and in the amounts following:

Date	Amount
March 19, 1919 . . .	$60,000.00
July 1, 1919	94,466.78
Sept. 17, 1919	72,596.50

8. On or about September 15, 1919, the plaintiff filed an amended return for the year 1918 covering the fiscal period July 1, 1917 to June 30, 1918, and thereon computed the total tax for the taxable year 1918 to be $234,088.50 and with the said amended return the plaintiff filed a claim for abatement of $68,350.33 representing the difference between the tax shown on its said first return and the said amended return filed therewith.

9. On or about October 15, 1920, the plaintiff filed a "Second amended return" for the taxable year July 1, 1917 to June 30, 1918, showing the tax for the said taxable year 1918 to be $127,651.08.

10. On February 2, 1923, the Commissioner of Internal Revenue notified the plaintiff that an examination of its income tax returns, books of account and records disclosed an additional tax liability for the years 1915, 1916 and 1917 aggregating $48,563.39.

11. On or about April 10, 1923, the plaintiff filed a claim on the required Treasury Department form for the refund of $107,826.61 of the taxes it had paid for the taxable year ended June 30, 1918.

12. On May 7, 1923, the Commissioner of Internal Revenue notified the plaintiff that an examination of its income tax returns and books of account for the years 1918 to 1921, inclusive, disclosed an overassessment for the year 1918 in the amount of $156,340.83.

13. On or about May 16, 1924, the Commissioner of Internal Revenue advised the plaintiff that the said $156,340.83 overassessment for the year 1918 had been made on the basis of certificate of overassessment No. 29852 and had been regularly scheduled on November 15, 1923.

14. By the said certificate of overassessment No. 29852 the company was allowed an overassessment for the year 1918 in the amount of $156,340.83, of which sum $75,461.39 was abated, thus making the net actual overpayment allowed to be $80,879.44, of which $2,467.60 was thereupon refunded to the plaintiff, $3,763.99 was properly credited to an underassessment for the year 1920 and $74,648.39 was credited to underpayments for prior years in the respective amounts following:

Year.	Amount.
1915	$348.74
1916	471.03
1917	69,548.62
Total	$74,648.39

15. The "Schedule of Overassessments" No. IT-A-7778, upon which the said overassessment was allowed and forwarded to the Collector at Boston, Massachusetts, for verification and recertification to the Commissioner of Internal Revenue, was dated on or about November 15, 1923.

16. The schedule of refunds and credits upon which the said overassessments appear was finally signed and approved by the Commissioner of Internal Revenue at a date subsequent to November 15, 1923.

17. On July 17, 1929, the plaintiff filed a claim for refund on the form required by law together with a supporting brief for the refund of $74,648.39 or "such greater amount as is legally refundable" and therein claiming that at the time the said sum was credited and applied to alleged underpayments for the years 1915, 1916 and 1917, the period of limitations for the collection and assessment of taxes for said years had expired.

18. On December 9, 1929, the Commissioner of Internal Revenue notified the plaintiff that its said claim was rejected for the reason that "the information in the case indicated a tax liability for the period under consideration equal to or in excess of the amount paid" so that there had been no overpayment of any of the plaintiff's income, war profits or excess profits taxes.

19. The Commissioner of Internal Revenue at any time notified the plaintiff officially or otherwise that the Commissioner's said determination of its taxes for the year 1918 or the said overassessment of $156,340.83 allowed for that year was in any respect erroneous or improper except the said letter of December 9, 1929, wherein the plaintiff's said claim for refund for $74,648.39 was rejected.

O. W. TAYLOR,
Attorney for Plaintiff.

OPINION.

October 13, 1931.

[Published Fed. 2d, .]

LOWELL, J. The plaintiff paid its taxes for the year 1918 to Collector John F. Malley. It filed a petition for a refund, which contained a claim of credit for deficiencies in the years 1915, 1916 and 1917. The petition was granted in the year 1924, and the Commissioner of Internal Revenue issued a certificate of overassessment, which he sent to Malcolm E. Nichols, who had succeeded Malley as collector. On January 3, 1924, Nichols allocated

part of the refund to the payment of deficiencies in the taxes for the years 1915, 1916 and 1917, as the plaintiff had requested, except that a greater amount than that asked was credited to the year 1917. The total of the requested credits was $48,563.39, while the amount credited was $74,648.39. On February 18, 1924, the Commissioner approved this action and paid the balance of the refund to the plaintiff. It is admitted by the Government that these payments were applied to outlawed taxes.

The plaintiff has experienced a change of heart and is now suing to recover the whole amount of credits. It contends that the Commissioner had no power to make these credits owing to the Revenue Act of 1928.

The arguments on both sides took a wide range, and many contentions were made which need not be considered, as in the opinion of this court the plaintiff is precluded from recovery by Sections 607 and 609 of the Revenue Act of 1928 (c. 852, 45 Stats., pp. 874, 875; U. S. C. A. Title 26, § 2607 and 2609). The only discussion of this subject with which I am familiar occurs in the case of *United Motors Corporation* v. *United States*, 44 F. (2d) 407, where Judge Patterson reaches a similar conclusion as to the meaning of these statutes. The sections read as follows:

"§ 2607. Effect of Expiration of Period of Limitation against United States:

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after May 29, 1928) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (May 29, 1928, 8:00 A. M., c. 852, § 607, 45 Stat. 874.)

"§ 2609. Erroneous Credits:

(a) Credit against Barred Deficiency. Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 2607.

(b) Credit of Barred Overpayment. A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 2608.

(c) Application of Section. The provisions of this section shall apply to any credit made before or after May 29, 1928. (May 29, 1928, 8:00 A. M., c. 852, § 609, 45 Stat. 875.)"

The purpose of the statute was to prevent the refund of payments collected by distraint after the period of limitation fixed by the Revenue Act of 1921 had run. It was passed to nullify the effect of the decision in *Bowers* v. *N. Y. & Albany Lighterage Co.*, 273 U. S. 346. See *Graham* v. *Goodcell*, 282 U. S. 409, 417, 418. It was not a remedial act in favor of taxpayers, but was designed to help the taxing authorities.

By Section 607 a tax paid after the period of limitation has ended, as in the present case, is declared to be an overpayment which shall be returned to the taxpayer if a claim has been filed within the prescribed period.

Section 609 relates to credits. Paragraph (a) of that section is poorly drawn. The evident intention is to put credits and refunds upon the same footing and provide that payments on a barred deficiency whether made directly by the taxpayer or indirectly by a credit shall not be disturbed unless a claim for the refund of the taxes paid for that year had been made. If we construe the paragraph strictly, this result will not be reached because of the use of the word "overpayment", which is declared by Section 607 to be a payment on a barred deficiency, and not, as the legislative mind evidently thought, a recoverable overpayment.

In my opinion, paragraph (a) should be construed as if it read: "Any credit . . . shall be void if any payment in respect of such liability would be considered an overpayment as to which the taxpayer is entitled to a refund under Section 607." This construction does some violence to the literal meaning of the statutory words, but the result is so obviously the one intended that it seems to me to be permissible, the more so as there could be no reason for refusing a refund and yet declaring a credit void.

In the case before the court no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 or 1917. As no refund could be made, the credit is not void.

Judgment for the defendants.

PLAINTIFF'S PETITION FOR APPEAL.

[Filed and Allowed December 7, 1931.]

Now comes the plaintiff, A. C. Harvey Company, a corporation of Cambridge, Massachusetts, and feeling itself greatly aggrieved by the order and judgment made and entered in this court pursuant to a written opinion of Honorable James A. Lowell, District Judge, on October 13, 1931, in favor of the defendants and against the plaintiff, hereby appeals from the said order and judgment to the United States Circuit Court of Appeals for the First Circuit for the reasons set forth in the "Bill of Exceptions" and "Assignment of Errors" filed herein.

Wherefore, the plaintiff prays that its appeal may be allowed and that citation may be issued as provided by law, and that a transcript of the record, proceedings and all other papers upon which the said opinion, order and judgment were based, duly authenticated, be certified and sent to the said United States Circuit Court of Appeals for the First Circuit, under the rules of said court and in accordance with the law in such cases made and provided.

O. W. TAYLOR,

Attorney for Plaintiff, Petitioner.

Petition for appeal allowed December 7, 1931.

J. A. LOWELL,

United States District Judge.

PLAINTIFF'S ASSIGNMENT OF ERRORS.

[Filed December 7, 1931.]

The plaintiff in the above-entitled cause, in connection with its petition for appeal, herein makes the following assignment of errors which it avers occurred at the trial and in the orders and rulings of the court entered herein, to wit:

1. The court erred in directing judgment to be entered for the defendant.

2. The court erred in refusing to grant or to rule upon the plaintiff's requests for findings of fact and rulings of law.

3. The court erred in refusing to direct judgment upon all of the facts and the law of the case to be entered for the plaintiff.

4. The court erred in ordering and ruling "that no refund could be made to the plaintiff because no claim has ever been filed for a refund of taxes for the years 1915, 1916 and 1917".

5. The court erred in ruling that "the plaintiff is precluded from recovery by Sections 607 and 609 of the Revenue Act of 1928".

6. The court erred in ruling that "the purpose of Sections 607 and 609 of the Revenue Act of 1928 was to prevent the refund of taxes collected by distraint after the period of limitations fixed by the Revenue Act of 1928 had run".

7. The court erred in ruling that the word "overpayment" as used in Section 607 of the Revenue Act of 1928 should be construed as if the words "recoverable overpayment" had been used in that section instead of the word "overpayment" alone.

8. The court erred in ruling that Sections 607 and 609 of the Revenue Act of 1928 are not "remedial" provisions in favor of the taxpayer but were designed solely for the benefit of the taxing authorities.

9. The court erred in ruling that paragraph (a) of Section 609 of the Revenue Act of 1928 should be construed as if that section read:

> "Any credit . . . shall be void if any payment in respect of such liability would be considered an overpayment as to which the taxpayer is entitled to a refund under § 607."

10. The court erred in refusing to rule that any tax collected after the period of limitation had expired is "absolutely void" and of no effect whatsoever, as provided in Section 609 of the Revenue Act of 1928.

11. The court erred in refusing to rule that such portion of the allowed and undisputed overpayment of the plaintiff's taxes for the year 1918 as was credited to the alleged taxes for the years 1915, 1916 and 1917, was "absolutely void" and of no effect under Section 609 of the Revenue Act of 1928.

Wherefore, the plaintiff prays that the judgment of the District Court may be reversed.

O. W. TAYLOR,
Attorney for Plaintiff.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PEESIDENT OF THE UNITED STATES,

To JOHN F. MALLEY, *former Collector of Internal Revenue at Boston, and/or* MALCOLM E. NICHOLS, *former Collector of Internal Reveuue at Boston, of Boston, Suffolk County, in the District of Massachusetts,* GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit of Appeals for the First Circuit, in the City of Boston, Massachusetts, on the sixth day of January next, pursuant to an appeal duly obtained from a judgment of the District Court of the United States for the District of Massachusetts, wherein the Arthur C. Harvey Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with a usual place of business in Boston, said Commonwealth, and you are appellees, to show cause, if any there be, why the said judgment entered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JAMES A. LOWELL, Judge of the District Court of the United States for the District of Massachusetts,

this seventh day of December, in the yeor of our Lord one thousand nine hundred and thirty-one.

JAMES A. LOWELL,
United States District Judge.

ACCEPTANCE OF SERVICE OF CITATION ON APPEAL.

UNITED STATES OF AMERICA.
DISTRICT OF MASSACHUSETTS, ss. BOSTON, December 7, 1931.

Service of the within citation on appeal is this day hereby accepted.

FREDERICK H. TARR, *United States Attorney,*
by J. DUKE SMITH, *Special Asst. to U. S. Attorney,*
for Plaintiffs.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the plaintiff, including true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 4819, LAW DOCKET,
ARTHUR C. HARVEY COMPANY, PLAINTIFF,
v.
JOHN F. MALLEY,
FORMER COLLECTOR OF INTERNAL REVENUE,
AND/OR
MALCOLM E. NICHOLS,
FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANTS,

in said District Court determined, together with the original citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at Boston in said District, this third day of February, A. D. 1932.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time to, and including, February 4, 1932, is here omitted. A. I. CHARRON, *Clerk.*]

In United States Circuit Court of Appeals for the First Circuit, October Term, 1931

No. 2667

Arthur C. Harvey Company, Plaintiff, Appellant,

v.

John F. Malley and/or Malcolm E. Nichols, Former Collectors of Internal Revenue, Defendants, Appellees

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

Opinion of the Court—June 27, 1932

Wilson, J.:

This is an appeal from a judgment of the District Court of Massachusetts in an action at law to recover an alleged overpayment of income taxes for the year 1918. In the first count of its declaration, the plaintiff-appellant seeks to recover of the defendants, jointly and severally, the amount of the alleged overpayment under a count of indebitatus assumpsit; it also seeks to recover of John F. Malley, a former collector of internal revenue, in a second count for money had and received, the amount of the alleged overpayment; and in a third count for money had and received, to recover of Malcolm E. Nichols, the successor of Malley as collector of internal revenue, the amount of the alleged overpayment. Malley was a collector in 1919 when the alleged overpayment occurred, and Nichols, as Malley's successor, under the direction of the Commissioner of Internal Revenue, in 1923 credited the alleged overpayment to deficiencies of prior years.

A motion was filed by each defendant to compel the plaintiff to elect on which count it would proceed, on the ground there was misjoinder of actions and also a misjoinder of parties. The motion was denied and hearing ordered on the merits.

There was a waiver of a jury trial and the case was heard by the judge without a jury. A request for findings of fact

and rulings of law was made by the plaintiff, but no special findings were made nor were the requested rulings of law either made or refused, nor were any exceptions to a refusal to rule as requested taken "in the course of the trial." So far as any rulings of law were made "in the course of the trial," with one exception they were in favor of the plaintiff, and though an exception was allowed in this instance, it is not relied upon in the assignments of error.

The plaintiff assigns as error a refusal to direct that a judgment be entered for the plaintiff; but we do not find in the record any express motion to that effect. The sixth requested ruling that the credit of $74,648.39 (being the amount of an overpayment of the 1918 taxes as determined by the Commissioner in May, 1923), to alleged underpayments for the years 1915, 1916 and 1917 constituted an overpayment for those years under Sections 607 and 609 of the Revenue Act of 1928, and should be refunded to the plaintiff, does not constitute a motion to direct a judgment; since whether a judgment should have been directed for the plaintiff depended upon other considerations than whether the application of an overpayment of the 1918 taxes to 1915, 1916 and 1917 deficiencies was void and constituted an overpayment for those years under Sections 607 and 609 of the Revenue Act of 1928.

It is doubtful, therefore, whether under Sections 649 and 700 R. S. any question of law is raised on the record for the consideration of this court by the appellant's assignments of error. The findings of fact are general, and no rulings of the court were excepted to "during the course of the trial," which are relied on. Exceptions, following an order of judgment, to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, are not rulings in the course of the trial. Fleischmann Cons. Co. v. United States, 270 U. S. 349; United States v. Smith, 39 Fed. (2d) 851; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121.

As the court said in Fleishmann Cons. Co. v. United States:

"It is settled by repeated decisions, that in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were

excepted to and duly preserved by bill of exceptions as required by the statute. * * * To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. * * * That is, as was said in Humphreys v. Third National Bank, supra, 655, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found, he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits.' "

Each of the assignments of error in this case relates either to matters of fact or to conclusions of law embodied in the opinion. These are not open to review, as there were no special findings of fact and no exceptions to rulings on matters of law were taken during the course of the trial and duly preserved by a bill of exceptions, and no questions of law favorable to the plaintiff are raised on the pleadings.

But assuming that the requested ruling above referred to was in effect a motion to direct a judgment for the plaintiff, and could be considered as denied, and an exception duly taken; or that the ultimate facts upon which the rights of the parties depend were agreed to, and an exception would lie to the order of judgment for the defendant, we still think the judgment of the District Court must be affirmed.

The facts are: That prior to 1918 the plaintiff company had closed its books for its fiscal year on June 30th, but filed its returns, as then required by law, for the years 1915, 1916 and 1917 on the basis of the calendar year. To conform to the Revenue Act of 1918, the plaintiff in March, 1919, made a return for the first six months of 1918, on which return its tax for the six months was assessed as $302,438.83, in accordance with the provisions of Section 226 of the 1918 Act, 40 Stat. 1075. The Commissioner

abated this tax to the amount of $75,461.39, and the appellant voluntarily paid to the defendant Malley as collector in 1919 the balance of $226,977.44.

Later, in September, 1919, the appellant filed an amended return, showing income for the full fiscal year from June 30, 1917, to June 30, 1918; and took, as the tax due for the six months from December 31 to July 1, 1918, the same proportionate part of the tax for the entire fiscal year, computed at the 1918 rates, as the portion of the fiscal year falling in 1918 was of the entire fiscal year in accordance with the provisions of Section 205 of the 1918 Act, 40 Stat. 1061, which resulted, according to its return, in a tax of $234,088.50.

In October, 1920, it filed a second amended return showing the tax for the six months from December 31, 1917, to July 1, 1918, to be only $127,651.08, and claimed that the tax assessed on its original return in March, 1919, was excessive to the amount of $174,787.75. No details of the original assessment, which was evidently computed in accordance with the provisions of Section 226 of the 1918 Act, are furnished.

On April 9, 1923, the plaintiff, as a result of an examination of its books by an internal revenue agent, filed a claim for refund based on the internal revenue agent's report of an alleged overpayment for 1918 of $156,390.41. In this claim, however, the taxpayer recognized that there were deficiencies for the years 1915, 1916 and 1917, and assented to the application of the overpayment to deficiencies for those years, amounting to $48,563.39, leaving a balance of $107,826.61, which it claimed should be refunded. On May 7, 1923, the Commissioner, adopting the view that in changing from a calendar year to a fiscal year the tax for any fractional part of a year should be computed in accordance with the provisions of Section 205 of the 1918 Act, determined that the correct tax for 1918, less the abatement already allowed, and based on the examination of the appellant's books by the revenue agent, was $146,098.00, and that there had been an overpayment of the taxes due from the appellant for the six months in question of $80,-879.44.

In November, 1923, the Commissioner issued his certificate of overassessment for the year 1918, showing the

overpayment of $80,879.44. Certificates of overassessment issued by a Commissioner contain printed instructions to the collector to pay any balance to the taxpayer, after crediting such portion of the overpayment that may be required to make good any deficiencies for previous years shown on the books of the collector.

This direction of the Commissioner was carried out by the defendant Nichols, and $2,467.06 was refunded to the appellant in cash; $3,763.99, it is agreed, was properly credited to certain underassessments for the fiscal year ending June 30, 1920; and $74,648.39 was credited to alleged deficiencies for 1915, 1916 and 1917 in the following amounts: $348.74 for 1915; $4,751.03 for 1916, and $69,548.62 for 1917. But the collection on May 23, 1923, of any additional taxes for the years 1915, 1916 and 1917 was barred by the limitation in Section 250 (d) of the Revenue Act of 1921; and Sections 607 and 609 of the Revenue Act of 1928 declared void any application of credits made after the limitation for collection of taxes.

The appellant's declaration sets forth as a basis of its right of recovery that the Commissioner in May, 1923, allowed a refund of $74,648.39 as an overpayment of the 1918 taxes; that it was erroneously credited by the defendant Nichols to the deficiencies in the 1915, 1916 and 1917 taxes; that on April 9th, 1923, the plaintiff filed a claim for a refund of $107,826.61, and on July 27, 1929, it filed another claim for a refund of the sum of $74,648.39, which the Commissioner had determined in May, 1923, in accordance with the provisions of Section 205 of the 1918 Act, was the amount of the overpayment of the 1918 taxes; that the claim filed in July, 1929, was denied, and, as the appellant contends, in accordance with the provisions of Section 3226 R. S., this action was brought within two years after the denial of its claim for a refund.

To avoid the objection that its suit, begun in 1930, was not brought within five years of the alleged overpayment, which was in 1919, the appellant asserts that the claim filed in 1929 was only a reassertion of its claim filed in 1923; and having filed a claim for a refund within four years of the payment of the tax, and since the claim filed in July, 1929, being a reassertion of its claim filed in 1923, was disallowed, and this action was brought within two

years of the disallowance, the provisions of Section 3226 R. S. were complied with.

But the claim filed in April, 1923, was allowed by the Commissioner, though for a different amount. The only ground of action the appellant had after the allowance of its claim in May, 1923, must have been either on the certificate of overassessment issued on the latter date by the Commissioner, or against the defendant Nichols personally for an erroneous application of the alleged overpayment to taxes already barred; but on the record, as will later appear, there was no overpayment of the 1918 tax, and the appellant was therefore not harmed by the act of the defendant Nichols. In respect to Malley's liability under the first count, it is also difficult to see how his act in accepting the payment of the taxes found due by the Commissioner based on the taxpayer's own return, could expose him to any action by the taxpayer, except for money had and received in case a refund was duly claimed and denied. But a claim for a refund barred by the statute cannot be revived by filing a new claim and basing an action on its denial.

If the appellant had declared as on an account stated, or a promise to pay by reason of the certificate of overassessment issued by the collector in May, 1923, as in Bonwit Teller & Co. v. United States, 283 U. S. 258, 265, we think its action would have to be brought against the United States, as neither of the defendants had anything to do with issuing of the certificate of overassessment or were privy to any promise therein contained, either express or implied, to refund the overpayment.

The acts performed by Malley or Nichols as collectors were ministerial, United States v. Swift & Co., 282 U. S. 468, and were done in the discharge of their several duties as a collector. Heffernan v. Alexander, 48 Fed. (2d) 855; Penn Smokeless Coal Co. v. Lewellyn, 26 Fed. (2d) 743; Semple v. Lewellyn, 1 Fed. (2d) 745, 748-9. The application of credits to deficiencies of other years by a collector, as shown by his books, is of no effect until approved by the Commissioner. United States v. Swift & Co., supra.

Whether or not the claim filed by the appellant in April, 1923, for a refund based on an examination of its books by an internal revenue agent, together with the claim filed on

July 29, 1929, was a sufficient compliance with Section 3226 R. S. on which to base an action against a collector for money had and received, or whether the application by the defendant Nichols of the alleged overpayment of the 1918 taxes to an assessment already barred must be regarded as an erroneous collection, Graham et al. v. Goodcell, 282 U. S. 409, 424, is really not important in this case; since to recover in such form of action the taxpayer must prove that the government has money in its possession justly belonging to the taxpayer.

"Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded." Lewis v. Reynolds, 284 U. S. 281, 283.

The record shows that when the second claim for refund was filed in July, 1929, the Commissioner, apparently under advice of counsel, made a redetermination of the 1918 tax for the six months from December 31, 1917, to July 1st, 1918, which he had a right to do, though he could not collect any additional tax, Lewis v. Reynolds, supra, and found that the previous assessment in May, 1923, which showed an overpayment of $74,648.39 was erroneous, the former computation having been based on Section 205 of the 1918 Act.

The appellant's tax in question was for a period entirely within the year 1918; and under Section 226 of the 1918 Act, 40 Stat. 1075, where a change is made from a calendar year to a fiscal year, and a portion of the first tax assessed under the 1918 Act was for a fractional part of the year 1918, the tax for the period shall be computed in the manner provided and at the rate for the calendar year in which the period falls. Appeal of Henry D. Weed, 2 B. T. A. 84.

Determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65, less the abatement of $75,461.39, so far as anything appears in the record, was correct, and there was, therefore, no overpayment. At least, the record does not disclose any error. The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money

justly belonging to the plaintiff. This burden the appellant has not sustained in this case.

The statement of the Deputy Commissioner in his letter to the appellant in December, 1929, denying its claim filed in July, 1929, that such portion of the overassessment which has not been refunded, having been credited against tax liabilities for prior years, will not be refunded, we interpret to be merely a categorical denial of the refund claim according to its terms, and that the reason assigned for the rejection of the claim was that the alleged overassessment in May, 1923, was erroneously allowed in its entirety. In other words, there was no overassessment, and therefore the refunding of that part of the alleged overassessment which was on the books of the collector applied to prior tax liabilities was denied, because no such overassessment and overpayment occurred.

The judgment of the District Court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1931.

No. 2667.

ARTHUR C. HARVEY COMPANY,
PLAINTIFF-APPELLANT,
v.
JOHN F. MALLEY, FORMER COLLECTOR,
AND/OR
MALCOLM E. NICHOLS, FORMER COLLECTOR,
DEFENDANTS-APPELLEES.

APPELLANT'S PETITION FOR REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Arthur C. Harvey Company, the plaintiff-appellant in the above-entitled case, and respectfully petitions for a rehearing and earnestly prays that this Honorable Court may reconsider its judgment rendered herein on June 27, 1932, for the following reasons:

First: Your petitioner has never been granted the opportunity fully to present all of its evidence, arguments and authorities in support of the cause of action as set forth in its declaration, as is clearly shown (1) by the true excerpt from the stenographic report of the trial together with the reporter's certificate under oath and (2) by a planographic reproduction of a letter written by the District Judge "after the trial" (see pp. 10–15, *infra*), all of which are by reference incorporated herein and expressly made a part of this petition.

Second: The opinion of this Honorable Court seems to assume, as a matter of fact, that the plaintiff did not make an overpayment of its taxes for the fiscal year 1918, whereas (1) the Certifi-

cate of Overassessment (Rec. p. 31), (2) the Schedule of Overassessment (Rec. p. 37), (3) the Schedule of Refunds and Credits (R. p. 37), all of which were put in evidence as valid documents by the Government, as well as (4) the Commissioner's letter of May 7, 1923 (R. pp. 23–28), which was put in evidence by the plaintiff, ***show conclusively that your petitioner did overpay its taxes for the taxable year 1918.***

Third: It is obvious error for this Honorable Court to hold that there was no overpayment of your petitioner's 1918 taxes, when the whole opinion of the District Court is predicated solely upon a conclusive finding of fact *that there was such overpayment*, which your petitioner respectfully submits is binding upon this Honorable Court.

Fourth: The opinion of the District Court disregards its own rulings made "in the course of the trial" and decides the case upon findings of fact not supported by the evidence, and a question of law "which was not discussed at the trial or noticed in the briefs" or embodied in any requests for findings or rulings made by the defendants "in the course of the trial".

Fifth: The opinion of this Honorable Court entirely disregards the vital fact that the District Court, "in the course of the trial", and upon the admissions of counsel for the defendants, found upon all the facts and ruled as a matter of law that the paintiff had "made out a prima facie case" (R. p. 16).

Sixth: The opinion of this Honorable Court entirely disregards the questions of fact and of law upon which the decision of the District Court rests, and discusses adversely to your petitioner other questions of fact which do not seem to be sustained by the record, and many technical questions of procedure which were not urged in the oral arguments or in the briefs, before this Honorable Court.

Seventh: The finding and ruling of the District Court to the effect that the plaintiff "had made out a prima facie case" which were not excepted to or overcome by any evidence presented by the defendants, was a "finding of the Court upon facts" as provided in Section 649 of the Revised Statutes (U. S. C. A. 28, 773).

Eighth: Since "the rulings of the Court in the progress of the trial" were in favor of the plaintiff and were not "excepted to at the time", or "duly presented in a bill of exceptions" filed by the defendants, those rulings are conclusive and binding upon this Honorable Court by the provisions of Section 700 of the Revised Statutes (U. S. C. A. 28, 875).

Ninth: The opinion of this Honorable Court erroneously holds, as a matter of fact, that the Commissioner of Internal Revenue "made a redetermination of the 1918 tax for the six months from December 31, 1918 to July 1, 1918", under Section 226 of the Revenue Act of 1918, but the evidence in the case shows clearly and conclusively that the only determination which the Commissioner ever made, in the manner and form required by the applicable statutes, was made under Section 205 (a) of the Revenue Act of 1918.

Tenth: The record in the case, even though rendered unsatisfactory by a combination of unfortunate circumstances which your petitioner could not reasonably be expected to have prevented, nevertheless sufficiently reveals the ultimate facts of the case and raises five questions for the decision of this Honorable Court, to wit:

1. Whether your petitioner actually made an overpayment of its taxes for the taxable year ended June 30, 1918, as the District Court found and ruled that it did.

2. Whether your petitioner's taxes for the taxable year ended June 30, 1918, should be computed under Section 205 (a) of the Revenue Act of 1918 or under Section 226 of that Act.

3. Whether the credits in 1923, of the allowed overpayment of your petitioner's taxes for the taxable year ended June 30, 1918, were rendered absolutely void and of no effect whatsoever by the provisions of Section 609 of the Revenue Act of 1928.

4. Whether the plaintiff in this suit has a good cause of action against the defendant Malley, to whom your petitioner's 1918 taxes were paid.

5. Whether the suit was begun within "two years of the disallowance of the part of such claim to which such suit or proceeding relates", as provided in Section 3226 of the Revised Statutes (43 Stat. c. 234, p. 342).

Eleventh: The opinion of this Honorable Court seems clearly to be in error in citing with approval the *Appeal of Henry D. Weed*, 2 B. T. A. 84, to show that your petitioner's 1918 taxes should be computed under Section 226 of the Revenue Act of 1918, because the application which this Court has made of the Henry D. Weed decision is directly in conflict (1) with the comments contained in that decision itself as well as (2) with the later decision of the Board of Tax Appeals in "*Appeal in Paso Robles Mercantile Company* v. *Commissioner*, 12 B. T. A. 750", which was affirmed by the Circuit Court of Appeals for the Ninth Circuit, *33 Fed. (2) 653*, and certiorari denied, *280 U. S. 595*, and (3) with the recent decision of the United States Supreme Court in the case of *American Hide and Leather Company* v. *United States, 52 S. Ct. 154*, all of which is more fully shown in the brief filed herewith in support of this Petition.

Wherefore your petitioner earnestly prays this Honorable Court as follows:

1. That the Court reconsider its opinion rendered herein on June 27, 1932.

2. That the Court grant your petitioner a rehearing before this Honorable Court, or, in the alternative.

3. That the judgment entered herein be vacated and the case remanded to the District Court for retrial.

4. That your petitioner be granted the right to be heard in oral argument for the allowance of this petition before the same shall be denied by this Honorable Court.

Respectfully submitted,

ARTHUR C. HARVEY COMPANY,

by O. WALKER TAYLOR,

its Attorney.

CERTIFICATE OF COUNSEL.

I, O. Walker Taylor, counsel for Arthur C. Harvey Company, hereby certify that I have prepared the above Petition; that it is presented to this Honorable Court at the request of and with the full approval of your Petitioner; that it is presented in good faith and not for the purpose of delay; that all of the allegations of fact contained therein are true to the best of my knowledge and belief and that there are good and substantial grounds for the allowance of the same in law and in justice.

O. WALKER TAYLOR.

CERTIFICATE OF PETITIONER.

We, Murray C. Harvey and Edward T. Edmands, Vice-President and Clerk, and Treasurer, respectively, of the Arthur C. Harvey Company, a corporation, petitioner herein, under and by virtue of the authority of the board of directors, hereby certify that we have read the foregoing petition and that the same is filed with our full consent and approval; that it is presented in good faith and with a firm belief in the fundamental merits of the case; that all of the allegations of fact contained therein are true to the best of our knowledge and belief, and that there are good and substantial grounds for the allowance of the same.

With reference to certain remarks made by H. C. Clark, Esq., of the General Counsel's office, in his oral argument before this Honorable Court, we certify to the good faith and integrity of our counsel, O. Walker Taylor, who prepared the foregoing petition.

In witness whereof, we have hereunto set our hands and seals and caused the corporate seal to be affixed hereto this twenty-second day of July, 1932.

MURRAY C. HARVEY,

[SEAL] *Vice-President and Clerk.*

EDWARD T. EDMANDS,

[SEAL] *Treasurer.*

itself offered in evidence as a valid document. All of the findings of fact and rulings of law, "in the course of the trial", were in favor of the plaintiff and could not very well have been objected to. "After the trial", however, the District Court completely changed its mind, disregarded all of its rulings made "during the course of the trial" and decided the case "on a question which was not discussed at the hearing or noticed in the briefs".

Your petitioner realizes and has always realized that the fundamental question involved in the case is whether or not the petitioner actually made an overpayment of its 1918 taxes and that the burden of proving such overpayment rested upon the plaintiff. This question, as we shall presently show, turns upon the further question of whether or not your petitioner's taxes for its fiscal year ended June 30, 1918, should be computed under Section 205 (a) of the Revenue Act of 1918, or under Section 226 of that Act. We respectfully invite the attention of the Court to the meaning of these two sections and their applicability in the case at bar as indicated by the decided cases and authorities cited below. If the District Court had permitted the plaintiff to put in its whole case in the regular and orderly manner, many of the objections to the Record which are commented upon in the opinion of this Honorable Court could have been avoided. When the Court ruled that the plaintiff *"had made out a prima facie case"* on the basis of the Certificate of Overassessment (R. p. 31) *that ruling was a conclusive and binding ruling of law and finding of fact that the plaintiff had actually overpaid its 1918 taxes.*

In order that this Honorable Court may be fully advised as to the manner in which the case was tried and decided in the District Court, your petitioner trusts that it may with propriety, and solely for the purposes of this petition, present here (1) a certified copy of a portion of the stenographic record of the trial and (2) a letter which the District Judge addressed to counsel for the petitioner "after the trial" when it was too late to put in any new evidence and take exceptions "in the course of the trial" on any of the findings and rulings upon which the decision of the District Court rests.

1. The Stenographic Record of the Trial (pp. 9–15) is as follows:

"Mr. CLARK. (For defendants.) We take the position that neither of these defendants can be sued in this action, and, if it would be of any assistance to Mr. Taylor in enabling him to elect with any more assurance, I am perfectly willing to outline our defense now.

The COURT. All right; do so.

Mr. CLARK. (For defendants.) We say that the only proper defendant in an action of this kind, assuming that the action must first have been properly brought in time and so on, would be the defendant Malley. We say that the defendant Nichols cannot be subjected to a suit on any set of facts such as we have here under any conditions.

The COURT. Well, now, I do not get you there.

Mr. CLARK. (For defendants.) I will be glad to explain.

The COURT. The only thing that bothered these people was that they credited the money which had been decided to be an overpayment on the part of an unpaid tax which was outlawed.

Mr. CLARK. (For defendants.) Yes, your Honor. I think that would explain it with reference to the facts we have here. This overassessment for the year 1918 was determined by the Commissioner of Internal Revenue, Mr. Blair, in Washington. That is the certificate of overassessment issued either in 1923 or not later than February, 1924.

The COURT. I believe there is grave doubt on this thing. I think we are wasting time over this thing. Your motions (defendants' motions to elect, Rec. pp. 10, 11) are overruled, and you may proceed with the case, and I will save your exception. Proceed, gentlemen."

Mr. TAYLOR. (For plaintiff.) Your Honor, briefly, the facts in this case are these. The evidence which we shall show is, first, that up to 1917, as the law required, this plaintiff had made all of its returns on a calendar year basis. The law required that the income be reported on the calendar

year regardless of the method of accounting which had been employed by the taxpayer. Under Section 212 of the Act of 1918, which became effective in 1919, or issued at least in 1919, every taxpayer was required to make its return on the basis upon which its books of account were kept. Now, of course, the law also provided that, with the permission of the Commissioner, a taxpayer might change and make his return on a different basis.

The COURT. I do not see what that has got to do with the question of a credit being made of something which had been outlawed.

Mr. TAYLOR. (For plaintiff.) Yes, your Honor, it has. I am sure—

The COURT. I am seeking for advice.

Mr. TAYLOR. (For plaintiff.) Of course, I guess we know so much about the case, your Honor is not quite—we have had so many of these details, I know it seems pretty difficult but I hope to make it clear. It will not be long.

The fact of the matter is that when this 1918 law came in for the fiscal year ending June 30th, the taxpayer did not know what to do. There was a lapse in there. They made their return for the year 1917, the full year. Now if they made a return for 1918 on the basis upon which the books were kept they would overlap into 1917. So most corporations did not know what to do in that situation. This corporation made the mistake in the first instance of filing a return covering its income from January 1 to June 30, 1918, just covering a period of six months, which was entirely improper and not in accordance with the 1918 Act.

Now it so happened here also that the taxes as shown on that return to be clearly erroneous were some $302,000. Later on the company filed an amended return, entirely in accordance with the provisions of Section 212 of the Acts of 1918, taking the entire fiscal period and dividing it by that proportion which fell in 1918, as the law required. That

resulted in this overassessment which we are seeking to recover.

The Commissioner did not examine either the original or the amended return until 1923, when all taxes for 1915, 1916 and 1917 were outlawed, and he discovered this overpayment based upon the proper return for the year 1918 and applied it to these outlawed taxes for the other years.

When the Act of 1928 came through, Section 607 said such an application of credit was an overpayment, and we immediately filed a claim, having previously filed a claim back in 1923, and the Commissioner answered by saying—or at least the General Counsel did—the Commissioner has never made any determination but on the recommendation of the General Counsel this refund was denied on the ground that the first six months' return—and we shall put in the letter on that, your Honor, saying that that was the ground, the sole ground upon which the Commissioner denied this refund, namely, that the true taxes for this company for this year were $302,000, and that therefore there was no overpayment for the year 1918, and it must follow, therefore, that there was nothing credited to any outlawed taxes for 1915, 1916 and 1917. That is the contention.

The COURT. Well, that is just about as clear to me as mud. I thought your statement, to begin with, or your declaration said that it had been declared to you that you had made an overpayment?

Mr. TAYLOR. (For plaintiff.) It did, your Honor, back in 1923; but when we filed a claim under the Act of 1928, the General Counsel's office completely changed that, undertakes to repudiate that determination, the certificate of overassessment and everything else, on the ground that the fiscal year return was erroneous. Now the only reason I am going into that is, out of an abundance of caution, to prevent them from asserting that as a matter of defense here, and I think that—

The COURT. Is there any question as to when it was told

to you that the amount of overpayment had been allocated to the deficiency of some other earlier tax?

Mr. TAYLOR. (For plaintiff.) No, sir, your Honor. We have the Certificate of Overassessment and the letters on that, which clearly show. We also have a letter allowing the overassessment which clearly shows that that was applied to these years, 1915, 1916 and 1917, after the period of limitation, which was five years, had expired. There is no question on that. The only question and what I am trying to avoid is the attempt in this suit of counsel for the Government to repudiate that original determination and certificate of overassessment by the Commissioner, which is just what they attempted to do in the letter in which they denied our claim, and that is why I was trying to go into all that, your Honor. **I think they are going to raise the question as to which return was proper, and we are prepared and we want to put in evidence on that.**

The COURT. Well, you sue because these allocations for past years were made after the statute had run. That is your suit, is it not?

Mr. TAYLOR. (For plaintiff.) Yes.

The COURT. (To counsel for defendants.) What do you say to that? In other words, if the certificate of overassessment, whatever it is, is valid—I understand you to say it is not valid but if it is valid—then it was too late after that to use this extra money in paying the former deficiencies. Do you admit that?

Mr. CLARK. (For defendants.) Yes, your Honor.

The COURT. All right.

Mr. CLARK. (For defendants.) The first thing that we are confronted with—

The Court. All right; I rule that Mr. Taylor has made out a prima facie case. I will hear you.

Mr. CLARK. (For defendants.) Would it be of any assistance if your Honor were to be informed briefly of the nature

of our defense so that you might follow the case as it proceeds?

The COURT. Are you talking about "briefly"? Considering this case has taken about 8 years, I assume it will not be brief. I will hear your defense now, briefly, or longly, or in any way you want. You admit that, if the certificate of overassessment is valid, then the statute of limitations had run?

Mr. CLARK. (For defendants.) For collection.

The COURT. I understood you to say so.

Mr. CLARK. (For defendants.) That is right.

The Court. Then I rule that the allocation of part of this money which the Government had to the payment of past deficiency was wrong, and therefore Mr. Taylor has made out a prima facie case, and I will hear you for the defense.

Mr. TAYLOR. (For plaintiff.) Your Honor—

The COURT. I would not advise you to speak. I may change my mind as to you. "Silence is golden", Mr. Taylor; proceed, sir.

Mr. CLARK. (For defendants.) I would proceed a little informally because we do not want to build too big a record on the part of the defendant.

The COURT. Most court proceedings, in my judgment, when they become too formal are absolute rot. I try to get down to the issue as quickly and as far as I can. Now I will hear you.

Mr. CLARK. We will offer a certified copy of the certificate of overassessment. In conjunction with that, we will offer a certified copy of the schedule of overassessments and schedule of refunds and ask that they be marked as 'Exhibits A, B and C'."

United States Courts
Boston

Chambers of
James A. Lowell
District Judge

September 28, 1951.

Dear Mr. Taylor:

I have been wrestling with the Harvey case with much perturbation of spirit and considerable profanity. As the matter stands in my mind now I shall decide the case on a question which was not discussed at the hearing or noticed in the briefs.

I am sending you a copy of a draft opinion which I have prepared, which, however, may not be final. I should like a re-argument on this sole question, - whether the credit in the Harvey case is not void because under Sections 607 and 609 a refund could not be had for the taxes of the years 1915, 1916 and 1917, as no claim for refund of those taxes had ever been filed.

I have told Mr. Smith that I wanted a re-hearing, and have asked him to confer with you and arrange as early a date as possible for it. Please get together with Mr. Smith and arrange for an early re-argument.

Very truly yours,

James A. Lowell

O. Walker Taylor, Esq.,
11 Beacon Street,
Boston, Massachusetts.

Reporter's Certificate.

Commonwealth of Massachusetts,)
County of Suffolk,) ss.
District of Massachusetts.)

Richard J. Martin, being first duly sworn, on oath says that he is a shorthand reporter, regularly practising in the Federal and State courts in said County of Suffolk, and, associated with Horace A. Edgecomb, shorthand reporter, the official reporter designated by the Department of Justice for reporting trials in the District of Massachusetts in which the United States is a party; that, as such reporter, he the said Martin attended the hearing in the matter of Arthur C. Harvey Company, plaintiff, versus John F. Malley et al., defendants, before Judge Lowell, in the United States District Court sitting at the City of Boston, District of Massachusetts, on August 6, 1931, and reported in shorthand the testimony offered and all proceedings had at said hearing before said Judge and caused the same to be transcribed in typewriting, and that the foregoing is a true and correct excerpt from the proceedings had therein.

Dated at Boston, Massachusetts, this 20th day of July, A. D. 1932. RICHARD J. MARTIN.

Subscribed and sworn to before me this 20th day of July, A. D. 1932. Hope Thompson Hanna
[SEAL] Notary Public.
My commission expires April 8, 1938.

2. A facsimile reproduction of a letter written to counsel for the plaintiff on September 28, 1931, is shown on the opposite page. Upon receipt of that letter the undersigned counsel for your petitioner and Mr. Smith for the defendants conferred with Judge Lowell in Chambers and were advised that the "reargument" referred to in the letter would be limited entirely to written briefs and that the Court would not allow a motion for a new trial at that time or permit the introduction of further evidence. The plaintiff

thereupon submitted a brief in which it fully set forth arguments and authorities to show that, by Section 609 of the Revenue Act of 1928, the credits of the allowed overpayment for 1918, to the outlawed taxes for 1915, 1916 and 1917, were absolutely void and of no effect whatsoever so that there was no payment of any taxes for 1915, 1916 and 1917, and it must follow that the plaintiff could not be required to have filed a claim for refund of taxes for those years.

Your petitioner respectfully submits that it is obvious from the foregoing document and statements that a full and fair trial of the case on its merits was not had or allowed in the District Court since under the circumstances as above outlined your petitioner could not take such exception "in the course of the trial" as the opinion of this Honorable Court holds that it should have done.

II.

THE EVIDENCE SHOWN IN THE RECORD CONCLUSIVELY PROVES THAT YOUR PETITIONER DID ACTUALLY MAKE AN OVERPAYMENT OF ITS TAXES FOR ITS FISCAL YEAR ENDED JUNE 30, 1918.

As to the fact of whether or not such overpayment was actually made, the opinion of this Honorable Court states as follows:

> "The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money justly belonging to the plaintiff. This burden the appellant has not sustained in this case."

Your petitioner respectfully submits that (1) the Certificate of Overassment (R. p. 31), (2) the Schedule of Overassessment (R. p. 37) and (3) the Schedule of Refunds and Credits (R. p. 37), all of which were offered in evidence by the defendants as valid documents, as well as (4) the Commissioner's letter of May 7, 1923 (R. pp. 23–28), which was put in evidence by the plaintiff, conclusively show that the plaintiff actually overpaid its taxes for the year 1918. In the brief submitted and in the oral argument before this Honorable Court the Government has never contended that the plaintiff did not overpay its 1918 tax. If it had done so, how could it have

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1932

No. 2667

ARTHUR C. HARVEY COMPANY, Plaintiff, Appellant,

v.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS, Former Collectors of Internal Revenue, Defendants, Appellees

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson, and Morton, JJ.

OPINION OF THE COURT ON MOTION FOR RECONSIDERATION, ETC.—October 11, 1932

WILSON, J.:

The plaintiff in this case filed a petition for a rehearing, which has been denied. It now asks to be heard orally on the question of the proper method of computing taxes under Secs. 205 and 226 of the 1918 Act in order that this court may correct what plaintiff's counsel conceives to be an error on the part of the court in interpreting these two sections.

Rule 29 requires that petitions for rehearing shall be filed within fifteen days after judgment. Plaintiff's motion is in effect a petition for rehearing in another guise. To establish a practice of granting such a motion, filed after the time has elapsed for filing a petition for rehearing, would render the rule nugatory. Furthermore, we do not think the grounds assigned by counsel have any merit.

The plaintiff's fiscal year ended on June 30. Prior to 1918 it had filed its returns on the basis of the calendar year. Under Sec. 226 of the 1918 Act it was obliged to file its returns on the basis of its fiscal year and a separate return for the period from December 31, 1917, to July 1, 1918. Counsel originally contended that the tax for this latter period should be computed according to the provisions of Sec. 205, but counsel now contends that whether

computed under Sec. 205 or Sec. 226, the result is the same.

Section 205 of the 1918 Act covered cases where the taxpayer made a return for a fiscal year beginning in 1917 and ending in 1918, while Sec. 226 applied to cases where the taxpayer had filed a return for the calendar year of 1917, but its fiscal year differed from the calendar year, in which case Sec. 226 provided that "a separate return shall be made for the period between the close of the last calendar year for which a return was made (in this case Dec. 31, 1917) and the date designated as the close of the fiscal year."

Under Sec. 205 the tax for the entire fiscal year beginning in 1917 and ending in 1918, and computed in accordance with that section, was apportioned according to the part of the fiscal year falling within each of the calendar years.

Counsel contends, apparently basing his contention on some language in the opinion in American Hide & Leather Company v. United States, 284 U. S. 343, 351, that the gross income and deductions for the entire fiscal year of 1917-1918 should be apportioned to the part of the fiscal year falling in 1918, and the tax computed on the net income thus obtained for that period, which, of course, assuming the gross income and deductions are agreed to, would produce the same result as if computed under Sec. 205.

But the question of how the tax should be computed under Sec. 226 was not in issue in the American Hide & Leather Company case, and the language in the opinion on which counsel relies, being obviously dictum, should not control this court, since it is not only contrary to the language of the statute, but would produce inequitable results.

To illustrate: Let us assume that the plaintiff corporation had a taxable income during the period from June 30, 1917, to January 1, 1918, of $50,000, on which, since it made its return for the year 1917 on the basis of the calendar year, it had already paid a tax under the 1916 Act, and from December 31, 1917, to July 1, 1918, its taxable income was $150,000. Applying the theory of the plaintiff's counsel, it would in such case be taxed on an income of only $100,000 during the period from December 31, 1917, to July 1, 1918, although its taxable income during that period was $150,000. In other words, under such an interpretation of Sec. 226 it would escape taxation on $50,000.

To state the converse of this: Assuming that its taxable income during the last half of the calendar year of 1917 was $150,000, and for the first half of 1918 was only $50,000, the taxpayer under the 1916 Act, making a return for the calendar year of 1917, would have already paid a tax on $150,000 of income; yet, according to the theory of counsel for the plaintiff, its return for the period of the fiscal year falling in 1918 should show a taxable income of $100,000, and as a result he would not only pay a tax on the $50,000 actually earned in the period of the fiscal year falling in 1918, but a double tax on $50,000 more earned in 1917.

Nothing more is needed to show that such could not have been the intent of Congress, when it said in Sec. 226 that, if a change were made from a calendar year to a fiscal year, "a separate return should be made for the period between the close of the last calendar year for which a return was made and the date designated as the close of the fiscal year."

It is clear that without the original return made in March, 1919, for the first six months of the year 1918, it cannot be shown that there was error in the denial of a refund by the Commissioner, assuming that the claim for refund had been filed within the time limit fixed by the statute.

Motion denied.

On April 14, 1932, this case came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the twenty-seventh day of June, A. D. 1932, the opinion of the court (page 63) was filed, and the following Judgment entered:

In United States Circuit Court of Appeals

Judgment—June 27, 1932

This cause came on to be heard April 14, 1932, upon the transcript of record of the District Court of the United

States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, June 27, 1932, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on July 26, 1932, a petition for rehearing (page 71) was filed, and on August 5, 1932, the following Order of Court was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING REHEARING—August 5, 1932

No judge who concurred in the opinion announced June 27, 1932, desiring a rehearing, it is ordered that the petition for rehearing filed July 26, 1932, be and the same hereby is denied.

By the Court.

Arthur I. Charron, Clerk.

MEMORANDUM RE STAY OF MANDATE

Thereafter, to wit, on August 23, 1932, mandate was stayed until further order of court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

APPELLANT'S MOTION TO BE HEARD IN ORAL ARGUMENT ON THE QUESTION OF THE PROPER METHOD OF COMPUTING THE TAXES—Filed September 19, 1932

Now comes the appellant in the above-entitled case and moves (1) that the order of August 5, 1932, denying the petition for a rehearing, be modified, and (2) that the appellant be granted the opportunity to present oral argument and authorities limited solely to the matter of the computa-

tion of the appellant's taxes for the six months' period ended June 30, 1918, a question which was not argued or discussed in the briefs either in the District Court or in this court, but which was raised and commented on for the first time in the opinion of this Honorable Court rendered herein on June 27, 1932, to wit:

Whether, as the opinion of this court holds, the correct computation of the appellant's taxes for the six months' period ended June 30, 1918, under Section 226 of the Revenue Act of 1918, "actually" results in the amount of $302,524.65 and "no overpayment".

The comments in the opinion which raise the question are as follows:

"The record shows that when the second claim for refund was filed in July, 1929, the Commissioner, apparently under advice of counsel, made a redetermination of the 1918 tax for the six months from December 31, 1917 to July 1st, 1918, which he had a right to do, though he could not collect any additional tax, Lewis v. Reynolds, supra, and found that the previous assessment in May, 1923, which showed an overpayment of $74,648.39 was erroneous, the former computation having been based on Section 205 of the 1918 Act.

The appellant's tax in question was for a period entirely within the year 1918; and under Section 226 of the 1918 Act, 45 Stat. 1075, where a change is made from a calendar year to a fiscal year, and a portion of the first tax assessed under the 1918 Act was for a fractional part of the year 1918, the tax for the period shall be computed in the manner provided and at the rate for the calendar year in which the period falls. Appeal of Henry D. Weed, 2 B. T. A. 84.

Determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65, less the abatement of $75,461.39, so far as anything appears in the record, was correct, and there was, therefore, no overpayment. At least, the record does not disclose any error. The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money justly belonging to the plaintiff. This burden the appellant had not sustained in this case."

Grounds for the Allowance of this Motion

The appellant respectfully submits:

I. That this Honorable Court has entirely misunderstood the method of computation prescribed by Section 226 as interpreted by both the Supreme Court and the Board of Tax Appeals.

II. That as a matter of fact and arithmetic there is no difference whatever in the amount of the appellant's taxes, for the six months' period, whether the computation be made under Section 226 or under Section 205 of the Act, the correct tax in either instance amounting to only $146,098.00.

III. That in its ultimate analysis the opinion of this Honorable Court holds that the Commissioner "had a right" to determine a tax of $302,524.67 upon a statutory income of only $247,695.20, which is obviously in error.

I

Under Section 226 of the Act the proper method of computing the taxes for only six months of a taxpayer's fiscal year is accomplished by first ascertaining the total items of income, deductions and credits for the entire fiscal year, dividing these items by two since the period is six-twelfths or one-half of the entire taxable year, and then calculating the taxes upon the net income thus obtained.

American Hide and Leather Co. v. United States, 52 S. Ct. 154.

Appeal of Henry D. Weed, 2 B. T. A. 84.

Appeal in Paso Robles Mercantile Co., 12 B. T. A. 750. (Affirmed C. C. A. Ninth Circuit, 33 Fed. (2) 653.) (Certiorari denied, 280 U. S. 595.)

The case of the American Hide and Leather Company v. United States, supra, is directly in point. That company had always kept its books of account on the basis of the fiscal year ending June 30, just as appellant company has done in the case at bar. The question arose as to the proper method of computing the taxes for the six months' period ended June 30, 1918. The American Hide and

Leather Company made an erroneous original return for the entire calendar year 1918. In the case at bar the appellant company made an erroneous return for only six months of the calendar year 1918. In holding that the American Hide and Leather Company was not bound by its erroneous return but that its taxes for the six months period should be properly computed under Section 226 of the Act, Mr. Justice Stone, who delivered the opinion of the court, said:

"There is no basis for the contention of petitioner that the taxes paid for each calendar year should be divided and one-half applied to tax due for the first six months and one-half for tax accruing in the last six months of the year. We think neither the circumstances nor the applicable statute permits such an allocation. Section 226 of the 1918 act authorizes the calculation of the tax for that part of a fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the *fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See Appeal of Weed, 2 B. T. A. 84."

NOTE.—The attention of the Court is called to the fact that in most of the early opinions published of the American Hide and Leather Company there was a typographical error. The word "calendar" appears instead of the word "fiscal" which we have starred in the above quotation. A certified copy of the decision from the clerk of the Supreme Court shows that this error was later corrected by the court by changing the word "calendar" to "fiscal" so that the opinion as finally approved reads as quoted above.

As to the case of the Appeal of Henry D. Weed, supra, which is entirely in accord with the decision of the Supreme Court in the American Hide and Leather Company case, we respectfully submit that this Honorable Court has entirely misapprehended the method of computation there prescribed. In that case the Board of Tax Appeals held that the tax should be computed under Section 226 but found the following fact:

"5. In his return for the five months' period ended May 31, 1918, the taxpayer reported five-twelfths of his net income for his fiscal period ended May 31, 1918."

If in the case at bar the same principle as outlined in the cases just cited is followed, the appellant is entitled to compute its taxes for the six months' period ended June 30, 1918, by taking six-twelfths of its net income for the entire fiscal year ended June 30, 1918, which amounts to only $247,695.20. (See Rec. p. 25.) In the very nature of the case the taxes for that period cannot possibly amount to "$302,524.66", less the abatement of $75,461.39, as the opinion of this court holds.

The appellants' erroneous original return was not put in evidence because the Commissioner rejected that return and issued his certificate of overassessment which the defendant admitted in open court to be valid (Rec. p. 16), which certificate is based upon the Commissioner's final determination of the appellant's net income for its entire fiscal year. However, it is possible upon this record properly to calculate the appellant's taxes for the six months' period ended June 30, 1918, in accordance with Section 226 of the Act, because its total income, deductions and credits for its entire fiscal year are shown in the Commissioner's letter of final determination dated May 7, 1923, Plaintiff's Exhibit 1, Rec. pp. 24-26. There is presented below the proper computations of the appellant's taxes for the six months' period ended June 30, 1918, both under Section 205 of the Act of 1918 and under Section 226 of that Act.

As a further indication that taxes paid on the basis of an erroneous return for only a portion of the entire year are to be readjusted, and allocated on the proper basis as required by the Statute, the attention of this Honorable Court is also invited to the comments in the Appeal of Paso Robles Mercantile Company, 12 B. T. A. 750, 754, which was affirmed by the Circuit — of Appeals for the Ninth Circuit and certiorari denied by the Supreme Court. In that case, the Board of Tax Appeals said:

"The statute makes no provision with respect to the method of crediting taxes paid on returns filed on one basis when they should be filed on another. The regulations of the Treasury Department are silent on the question. The

Commissioner for a period used one method and subsequently changed to another. There are no decisions on the question. We are then left to considerations of reason and general principles.

In our opinion, a tax erroneously determined on a calendar year basis should be credited on a tax shown due on a fiscal year basis in proportion to the months in the respective calendar years making up the fiscal year. By this method eleven-twelfths of the tax shown on the basis of the calendar year 1920, for instance, should be credited to the fiscal year 1921, since eleven-twelfths of the calendar year 1920 is in the fiscal year 1921.

It is true that the income for a year is determined on an annual basis, but the Supreme Court has found no difficulty in pro rating the earnings of the year in order to determine the amount thereof available for dividends at a particular period within the year. See Edwards v. Douglas, 269 U. S. 204; Mason v. Routzahn, 275 U. S. 175; 38 Sup. Ct. 50.

On the same principle we think the taxes might be pro rated over the year in order to allocate to the respective periods of any calendar year a proportionate part thereof applicable to those periods when the tax paid on a calendar year basis is to be credited on the tax liability on a fiscal year basis."

The appellant most respectfully requests that this Honorable Court will reconsider its holdings as to the method of computing taxes under Section 226 of the Act in the light of the "real holdings" of the Board of Tax Appeals in the case of the Appeal of Henry D. Weed, supra, and more especially in the light of the decision of the United States Supreme Court in the case of the American Hide and Leather Company, supra.

II

Under Section 205 of the Revenue Act of 1918, the computation of the taxes for a six months' period of the taxable year is accomplished by taking the gross income, deductions and credits for the entire year, calculating the tax on the net income thus obtained and dividing the tax by two instead of dividing the separate items by 2 as is prescribed

in the case of the computation under Section 226 of the Act.

The computation under Section 205 of the Act is so clearly stated in the Statute itself that it has not been the subject of controversy before the Board of Tax Appeals or in the courts as has been the case under Section 226. It is, therefore, unnecessary to cite cases prescribing the method of computation under Section 205. In the case at bar the record shows (pp. 24-26) that in the only statutory determination of the appellant's taxes for the six months' period ended June 30, 1918, which the Commissioner has ever made, the computation was made in accordance with Section 205 of the Act. The actual computation of the taxes appears at page 26 of the record.

III

As a matter of fact it is entirely immaterial whether the appellant's taxes for the six months' period ended June 30, 1918, be computed under Section 205 or under Section 226 of the Act of 1918. The only difference between the two computations is one of arithmetical method and not of results. In order that this point may be clearly revealed to this Honorable Court we present herewith the wording of the two sections themselves and the respective computations thereunder made in accordance with the methods which have been prescribed both by the United States Board of Tax Appeals and by the United States Supreme Court.

Section 205 (a) of the Revenue Act of 1918 provides as follows:

"Fiscal Year with Different Rates"

"Sec. 205 (a) That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the

portion of such period falling within the calendar year 1918 is of the entire period: * * *"

Section 226 of the Act of 1918 is as follows:

"Returns When Accounting Period Changed"

"Sec. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year he shall make a separate return for the period between the beginning of the calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the credits provided in subdivisions (c) and (d) of section 216 shall be reduced respectively to amounts which bear the same ratio to the full credits provided in such subdivisions as the number of months in such period bears to twelve months."

In the case at bar, as stated above, there is no dispute as to any of the items of income, deductions, credits or exemptions for the appellant's entire fiscal year ended June 30, 1918. All of these figures have been definitely determined and fixed by the Commissioner as shown in the Plaintiff's Exhibit "1," pages 24 to 26 of the record. These figures are as follows:

Net income as corrected (see Rec. p. 25)	$495,390.40
Invested capital for taxable year (see Rec. p. 25)	1,425,579.73

Total excess-profits credits (see Rec. p. 25)	117,054.38
Total war-profits credits (see Rec. p. 26)	164,088.78

Using these established figures, the correct computations of the plaintiff's taxes for the six months' period ended June 30, 1918, under the respective sections are as follows:

1. The correct computation under Section 205 of the Act, as made by the Commissioner and shown on page 26 of the record, is as follows:

"Computation of Taxes"

"Not over	Income	Deduction	Balance	Rate	Tax
20%	$285,135.95	$117,054.38	$168,081.57	30%	$50,424.47
Over 20%	210,254.45	.....	210,254.45	65%	136,665.39
	$495,390.40	$117,054.38	$378,336.02		$187,089.86

War-profits Tax

Net Income	$495,390.40		
Less Credit	164,088.78		
Balance taxable at 80%	$321,301.62	$265,041.30	
Less Excess profits tax		187,089.86	
			77,951.44
Total excess profits and war profits taxes			$265,041.30

Computation of Total Tax

Excess profits and war profits taxes			$265,041.30
Net income as corrected		$495,390.40	
Less:			
Interest on U. S. obligations.	$2,060.00		
Profits tax	265,041.30		
Exemption	2,000.00		
		269,101.30	
Taxable at 12%		$226,289.10	27,154.69
			$292,195.99
One-half, for six months period			$146,098.00
Previously assessed:			
(Original assessment, Account No. 402091)			$302,438.83
Tax Liability			146,098.00
Indicating an Overassessment of			$156,340.83"

2. The correct computation under Section 226 as prescribed by the cases cited above, which is not shown in the record, is as follows:

"Computation Under Section 226 of the Act"

"Net Income—6/12 of $495,390.40	$247,695.20
Invested Capital—6/12 of $1,425,579.73	$712,789.87

"Computation of Taxes"

"Not over	Income	Deduction	Balance	Rate	Tax
20%	$142,557.97	$58,523.19	$84,034.78	30%	$25,210.43
Over 20	105,137.23		105,137.23	65%	68,339.20
	$247,695.20	$58,523.19	$189,172.01		$93,549.63

War-profits Tax

Net Income	$247,695.20		
Less Credit	82,044.39		
Balance taxable at 80%	$165,650.81	$132,520.65	
Less Excess profits tax		93,549.63	
			38,971.02
Total excess profits and war profits taxes			$132,520.65

Computation of Total Tax

Excess profits and war profits taxes			$132,520.65
Net income		$247,695.20	
Less:			
Interest on U. S. obligations.	$1,030.00		
Profits tax	132,520.65		
Exemption	1,000.00		
		134,550.65	
Taxable at 12%		$113,144.55	13,577.35
			$146,098.00
(Original assessment, Account # 402,091)			$302,638.83
Tax Liability			146,098.00
Indicating an overassessment of			$156,340.38"

In holding that "determined under Section 226—there was, therefore, no overpayment" of the appellant's taxes for the six months' period ended June 30, 1918, this Honorable Court seems to have relied solely upon the misleading and confusing statements contained in the letter of December 17, 1929, Defendant's Exhibit "D," Rec. page 45, which states as follows:

"You are advised that the records of this office indicate that your return for the period ended June 30, 1918, disclosed a tax liability of $302,524.67. * * *

The proper method for computing the income for the six months' period in question is in accordance with the original

return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84, and Appeal of Coghlen Electric Company, 3 B. T. A. 1071) and Section 226 of the Revenue Act of 1918."

This Honorable Court has apparently disregarded all of the other evidence in the case which is in direct contradiction of the letter of December 17, 1929, to wit:

1. The Commissioner's letter of May 7, 1923, Rec. pp. 23-26.

2. The Certificate of Overassessment, Rec. p. 31.

3. The Schedule of Overassessments, Rec. p. 37.

4. The Schedule of Refunds and Credits, Rec. p. 37.

These documents show conclusively that there was an overpayment. It is perfectly obvious that if the letter of December 17, 1929 is right all of these documents are wrong. But the Government admitted, both in the District Court and before this Honorable Court, that the Certificate of Overassessment and the other documents were valid and sought to defeat recovery on various other grounds which did not involve the computation of the tax or the question of whether or not there had been an actual overpayment of the appellant's taxes.

The letter of December 17, 1929, says that "the return for the period ended June 30, 1918, disclosed a tax liability of $302,524.67", but the return itself showing the figures upon which that tax liability is determined is not in evidence. The fact is that the Commissioner properly rejected that return in May, 1923, because it did not then, any more than it did on December 17, 1929, conform to the requirements of the statute.

The letter also says that "the proper method of computing the income for the six months' period in question is in accordance with Section 226 of the Revenue Act of 1918", but there is no evidence in the record to show the actual computation of the tax "in accordance with Section 226 of the Act", such as is presented above.

Furthermore the holdings of this Honorable Court seem to amount to a "finding of fact" which is contrary to the whole theory upon which the District Court decided the case. That court did not find that there had been no overpayment of the taxes for 1918. Its decision is predicated

upon the fact that there was such an overpayment actually credited to the outlawed taxes for 1915, 1916 and 1917.

Regardless of all of the uncertainties both of law and of fact and the unsatisfactory manner in which this case was tried, the record shows beyond dispute that the appellant's total income for the entire fiscal year was only $495,390.40. (See Rec. p. 25.) One-half of this amount, which is $247,695.20, is all that is properly attributable to the six months' period.

Aside from all other questions involved in the case, the appellant respectfully submits that this Honorable Court should reconsider its comments in regard to the method of computation of the taxes under Section 226 of the Act not only because the opinion will be widely quoted and referred to by other taxpayers, courts and attorneys, where that question arises, but also because the holdings of this Honorable Court in that regard are directly in conflict with the applicable decisions of the Board of Tax Appeals.

It is obviously inconceivable that there can be a tax of $302,524.67 on a net income of only $247,695.20, as the letter of December 17, 1929 states. Nor can the taxes on a statutory income of only $247,695.20 be "$302,524.65, less the abatement $75,461.39", or $227,063.26, as the opinion of this Honorable Court holds in the comments quoted above.

Wherefore the appellant earnestly prays that its within motion may be allowed to the end that at least this error on the part of this Honorable Court may be reconsidered and corrected before the opinion becomes final.

By O. Walker Taylor, Attorney for Appellant.

Thereafter, to wit, on October 11, 1932, the opinion of the court on motion for reconsideration, etc. (page 77) was filed, and the following Order of Court was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION FOR LEAVE TO ARGUE ORALLY, ETC.—October 11, 1932

It is ordered that the motion for leave to argue orally on the question of the proper method of computing taxes be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

No. —

ARTHUR C. HARVEY COMPANY, Petitioner,

vs.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS, Former Collectors, Respondents

ORDER EXTENDING TIME WITHIN WHICH PETITIONER MAY APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby extended for a period of thirty days from November 4, 1932.

Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

October 24, 1932.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,234. U. S. Circuit Court of Appeals, First Circuit. Term No. 537. Arthur C. Harvey Company, petitioner, vs. John F. Malley and/or Malcolm E. Nichols, former collectors. Petition for a writ of certiorari and exhibit thereto. Filed December 3, 1932. File No. 37,234.

Office Supreme Court, U. S.
FILED
DEC 3 1932
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 537

ARTHUR C. HARVEY COMPANY,
Petitioner,

v.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS,
Former Collectors,
Respondents.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF SAME.

O. WALKER TAYLOR,
Attorney for Petitioner.

L. H. LANE, Law Printer, 221 High Street, Boston.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.

ARTHUR C. HARVEY COMPANY, PETITIONER,

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices Thereof:

Your petitioner, Arthur C. Harvey Company, a corporation of Boston, Massachusetts, by O. Walker Taylor, its undersigned attorney, respectfully represents that it has been greatly aggrieved (1) by the judgment of the Circuit Court of Appeals for the First Circuit rendered herein on June 27, 1932 (60 Fed. (2) 97, Rec. pp. 63–70), and (2) more particularly by that Court's supplemental written opinion rendered on October 11, 1932 (unreported; Rec. pp. 77–79) denying the petitioner's motion to be heard on "the method of computing the petitioner's taxes for the six months period ended June 30, 1918" (Rec. pp. 81–92)—a question which was not raised or discussed orally or in the briefs, either at the trial in the District Court or at the hearing before the Circuit Court of Appeals, but was raised, for the first time, and ruled upon in the aforesaid opinion of the Circuit Court of Appeals on June 27, 1932.

In compliance with Section 2 of Rule 38 of this Court, the matters involved, stated as clearly and briefly as the inherent complexities of the case and the unusual proceedings thereon seem to permit, are as follows:

I. STATEMENT OF THE CASE.

1. The suit was brought by a writ dated January 25, 1930, to recover the sum of $74,648.39, with interest, which the Commissioner of Internal Revenue, on or about February 18, 1924, *actually approved and allowed* as an "*overpayment*" of the petitioner's income, excess-profits, and war-profits taxes for the six-months period ended June 30, 1918, *but thereupon wrongfully credited and applied to outlawed taxes for other years*, and, thereafter, *denied and disallowed, for the first time*, on December 17, 1929, solely to avoid the effect of *Section 609 of the Revenue Act of 1928* (45 Stat. 874; 26 U. S. C. A. 2609), which declares such credits to be *void*, whether made before or after the passage of that Act.

2. The petitioner, plaintiff-appellant below, seeks recovery of the said sum ($74,648.39) either (1) as "1918 taxes wrongfully collected and credited", as alleged in Count I of the plaintiff's declaration (Rec. pp. 3–8), or, (2) as "money had and received by the defendant Malley", as alleged in Count II of the plaintiff's declaration (Rec. p. 8).

3. The defendants answered separately, by way of general denials (Rec. pp. 9–10), and set forth no special defenses (1) as to the jurisdiction of the District Court, (2) as to any matters alleged in the declaration, or (3) as to any statute of limitation.

II. PETITIONER'S CONCESSION AS TO THE DEFENDANT NICHOLS.

1. When this suit was brought the question of the liability of a Collector who credited an allowed overpayment to outlawed taxes had not been settled; now, however, in view of the recent decision on that question by the Circuit Court of Appeals for the Sixth Circuit in the case of *Routzahn* v. *Reeves Brothers Company*, 59 Fed. (2) 915, in which this Court recently denied a writ of certiorari, the petitioner concedes and admits that it has no cause of action against the defendant Nichols.

2. The petitioner still contends, however, and respectfully submits to this Court that it has a good and just cause of action against the defendant Malley (1) either "for money had and received" or (2) upon its rejected claim for refund of the over-

payment of its 1918 taxes under Section 3226 of the United States Revised Statutes as amended, 26 U. S. C. A. 156, since this suit was brought within two years of the disallowance of a proper claim for refund seasonably filed.

III. STATEMENT OF THE FACTS AND STATUTES INVOLVED.

1. The petitioner, on March 14, 1919, having always kept its books of account on the basis of a fiscal year ending June 30th, filed a return for the six-months period ended June 30, 1918, pursuant to Section 212 (b) of the Revenue Act of 1918 (40 Stat. 1057), which actually overlapped and included a portion of the income which had already been included in its return for the year 1917—made on the calendar year basis—pursuant to the Revenue Act of 1917; and, on the basis of that *erroneous return* taxes were assessed in the amount of $302,524.65, of which the petitioner paid $227,063.26 to the defendant Malley, and, on April 9, 1923, having previously filed a corrected or amended return and a claim for the abatement of the balance of the assessment, the petitioner seasonably filed a proper claim for refund of $107,826.61 (Rec. pp. 47, 49).

2. The Commissioner did not make his examination of the returns and claims thus filed for the year 1918 until some time in 1923, when it was too late to assess or collect any taxes for the years 1915, 1916 and 1917, by credit or otherwise, and thereupon, after such examination the Commissioner (1) *accepted and approved the amended return*, (2) determined the original assessment to be excessive in the amount of $156,340.83, (3) abated the $75,461.39 thereof which had not been paid, and (4) *officially allowed the petitioner's claim for refund in the amount of $80,879.44*, all of which is clearly shown in the record by the following documents:

(1) The Commissioner's final letter of determination dated May 7, 1923 (Rec. p. 23);

(2) The Schedule of Overassment approved December 20, 1923 (Rec. p. 37);

(3) The Schedule of Refunds and Credits, approved February 18, 1924 (Rec. p. 37);

(4) Certificate of Overassessment No. 29,852 issued to the petitioner on May 16, 1924 (Rec. p. 31).

3. Thereupon, the defendant Nichols, who had then become Collector of Internal Revenue, acting under instructions from the Commissioner (Rec. p. 37), credited and applied $74,648.39 of the allowed overpayment of $80,879.44, to alleged underpayments of the petitioner's taxes for the years 1915, 1916 and 1917, after the expiration of the five-year period of limitation for the assessment and collection of any such taxes for those years, as provided in Section 250 (d) of the Revenue Act of 1921 (44 Stat. 265).

4. The Revenue Act of 1928 (45 Stat. 875; 26 U.S.C.A. 2609), which did not become effective until May 29, 1928, provides as follows:

> "*Section 609. Erroneous Credits.*
>
> (a) Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607.
>
> . . . . . .
>
> (c) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this Act."

5. In the light of this new legislation on the matter of such credits, the petitioner on July 27, 1929, filed a petition with the Commissioner of Internal Revenue (Rec. pp. 41–44) requesting that the $74,648.39, as previously allowed, should be refunded, since a sufficient claim therefor had been seasonably filed on April 9, 1923 (Rec. pp. 39–40).

6. Thereupon, solely to avoid to the effect of Section 609 of the Act of 1928, *supra*, the Commissioner of Internal Revenue *entirely repudiated his previous determination and allowance and denied that there had ever been any overpayment of the petitioner's 1918 taxes* and in a letter dated December 17, 1929 (Rec. p. 49) said:

> "The return for the six months' period above-mentioned apparently was filed to adjust the filing basis to a fiscal year and the tax was assessed on that basis. In the computation producing the overassessment of $156,340.83 the tax liability was computed under the basis of the net

income for the entire year taking 6/12 thereof as representing the tax for the six months' period ended June 30, 1918.

The proper method for computing the income for the six months' period in question is in accordance with the original return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84 and Appeal of Coghlen Electric Company, 3 B. T. A. 1071 and Section 226 of the Revenue Act of 1918).

. . . . . .

It is accordingly held that the overassessment was erroneously allowed, and, therefore, that portion of the overassessment which has not yet been refunded, having been credited against the tax liability for prior years, will not be refunded at this time. Your claim will be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner."

7. The foregoing letter of December 17, 1929, was the first time the Commissioner of Internal Revenue had ever (1) rejected the amended return, (2) denied that there had been an overpayment of the 1918 tax, or (3) disallowed the petitioner's claim of April 9, 1923; and this suit, as above stated, was begun on January 5, 1930, or "*within two years after the disallowance of the part of such claim to which such suit or proceeding relates*", as provided in Section 3226 of the United States Revised Statutes as amended (26 U. S. C. A. 156).

8. But, at the trial in the District Court, August 6, 1930, Counsel for the Government, again shifting positions, in open Court admitted (1) that the previous determination or allowance of the overpayment was right, (2) that the Certificate of Overassessment and the official Schedules were valid documents and (3) that the credits of the allowed overpayment to the assumed taxes for 1915, 1916 and 1917 had actually been made after the statute of limitations as to those years had run; and thereupon the District Court found and ruled (1) that the plaintiff, petitioner herein, *had made out a prima facie case*, and (2) that it was unnecessary for the plaintiff to proceed further by putting in evidence the original and amended returns and its

other proof, as your petitioner was ready, willing and, in fact, offered to do. (See colloquy, Rec. pp. 76D–76F.)

9. Thereupon the whole defense in the District Court was rested upon the contentions (1) that the Commissioner's letter of December 17, 1929 (Rec. pp. 49–50) was not a rejection of the petitioner's claim of April 9, 1923 (Rec. pp. 47–49), (2) that the plaintiff could not sue a collector in the District Court on an allowed claim and (3) that the suit was barred by the statute of limitations.

10. The District Court also shifted its position and did not adhere to its findings and rulings thus *"made in the course of the trial"* but thereafter, on September 28, 1931, notified counsel by letter that the case would be decided *"on a question which was not discussed at the hearings or noticed in the briefs"* (see Rec. opp. p. 76G) and in its written opinion (50 Fed (2) 885; Rec. pp. 56–59) the District Court held and ruled as follows:

> "In the case before the Court no refund could be made to the plaintiff because no claim has ever been filed for a refund of taxes for the years 1915, 1916 or 1917. As no refnnd could be made, the credit is not void."

11. The petitioner seasonably perfected an appeal (Rec. pp. 14–22) whereupon the case came on for hearing and was argued before the Circuit Court of Appeals on April 14, 1932 and there Counsel for the Government again admitted in open Court (1) that the Commissioner's determination of May 7, 1923 (Rec. pp. 23–26) was right; (2) that the claim for refund was actually allowed, but (3) insisted that a collector cannot be sued on an allowed claim; and neither in the oral arguments nor in the briefs, either in the District Court or in the Circuit Court of Appeals, was it ever contended or intimated that the petitioner's taxes for the six months' period ended June 30, 1918 should be computed under Section 226 of the Revenue Act of 1918 (40 Stat. 1057), or that there had been no overpayment.

12. The Circuit Court of Appeals, in turn, entirely disregarded the admissions of Government counsel, thus made in open Court, to the effect that the previous determination *was right*, as well as all of the other documentary proof thereof

above referred to, and held that the determination *was wrong* and that the taxes for the six months period should be computed under Section 226 of the 1918 Act (40 Stat. 1075).

13. Although the defense failed to put in evidence (1) the return, or (2) any figures whatsoever upon which any such computation under Section 226 can be made, in its opinion (Rec. pp. 69–70) the Circuit Court of Appeals comments and holds as follows:

> "The record shows that when the second claim for refund was filed in July, 1929, the Commissioner, apparently under advice of counsel, made a redetermination of the 1918 tax for the six months from December 31, 1917, to July 1st, 1918 which he had a right to do, though he could not collect any additional tax, *Lewis* v. *Reynolds*, *supra*, and found that the previous assessment in May, 1923, which showed an overpayment of $74,648.39, was erroneous, the former computation having been based on Section 205 of the 1918 Act.
>
> . . . . . .
>
> Determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65, less the abatement of $75,461.39 so far as anything appears in the record, was correct, and there was, therefore, no overpayment. At least, the record does not disclose any error. The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money justly belonging to the plaintiff. This burden the appellant has not sustained in this case."

14. "The former computation—based on Section 205 of the 1918 Act", *was actually made and is presented in evidence and is shown in the record*, together with the items of gross income and deductions whereon the Commissioner, *officially and in fact*, made the computation and determined (1) that the original assessment of $302,524.65 was wrongful and excessive in the amount of $156,340.83 and (2) that the petitioner's taxes for the six-months period amounted to only $146,098 (Plaintiff's Exhibit 1; Rec. pp. 24–26); *but*, this record fails entirely to disclose

(1) any *actual official computation* under Section 226, (2) either the petitioner's original or amended return, (3) the amount of the net income, or any figures whatsoever upon which such computation can be made, to show that: "determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65 less the abatement of $75,461.39 . . . was correct".

15. The pertinent parts of the two disputed sections are as follows:

(*1*) *Section 205* (*40 Stat. 1061*).

"Sec. 205 (a). That if a taxpayer makes a return for a fiscal year beginning in 1917 and ending in 1918 his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period. . . ."

(*2*) *Section 226* (*40 Stat. 1075*).

"Sec. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is from calendar year to fiscal year, a *separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated at the close of the fiscal year.*

. . . . . .

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for

the calendar year in which such period is included; and the credits provided in subdivision (c) and (d) of section 216 shall be *reduced respectively to amounts which bear the same ratio to the full credits provided in such subdivisions as the number of months in such period bears to twelve months.*" (Italics supplied.)

16. Thereafter, by reason of the fact that the question of the *method of computation or the meaning of the two sections above referred to had not been mentioned or discussed throughout the entire proceedings, either in the District Court or in the Circuit Court of Appeals*, your petitioner seasonably filed a petition for a re-hearing before the Circuit Court of Appeals (Rec. pp. 78-80), which was denied by an order of that Court dated August 5, 1932 (Rec. p. 80).

17. Whereupon the petitioner filed a motion to be heard in oral argument "*limited solely to the matter of the computation of the tax*", and therein (1) submitted to the Circuit Court of Appeals *an actual computation under Section 226*, and (2) contended if the computation should be made by the apportionment of the gross income and deductions for its fiscal year ended June 30, 1918, "*pro rata to the taxable fiscal period in order to arrive at the net income for the latter*" its true, actual and correct tax would be only $146,098 (Rec. pp. 89-90).

18. In support of the allowance of that motion counsel for the petitioner quoted the following language of Mr. Justice Stone in the case of the *American Hide and Leather Company* v. *United States*, 284 U. S. 343, 351; 52 S. Ct. 154:

> "Section 226 of the 1918 act authorizes the calculation of the tax for that part of a fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed*, 2 B. T. A. 84."

19. Your petitioner relied and still relies upon the case of the American Hide and Leather Company and the language of Mr. Justice Stone in the opinion of that case being directly in point, but in its opinion of October 11, 1932 (Rec. pp. 77-79) the Cir-

cuit Court of Appeals comments upon that language and holds as follows:

> "Counsel contends, apparently basing his contention on some language in the opinion in *American Hide & Leather Company* v. *United States*, 284 U. S. 343, 351, that the gross income and deductions for the entire fiscal year of 1917–1918 should be apportioned to the part of the fiscal year falling in 1918, and the tax computed on the net income thus obtained for that period, which of course, assuming the gross income and deductions are agreed to, would produce the same result as if computed under Sec. 205.
>
> But the question of how the tax should be computed under Sec 226 was not in issue in the American Hide & Leather Company case, and the language in the opinion on which counsel relies, being obviously dictum, should not control this Court, since it is not only contrary to the language of the statute, but would produce inequitable results."

20. In all of the foregoing your petitioner respectfully submits to this Honorable Court that there have been manifold errors and irregularities throughout the entire proceedings on the case, to wit:

IV. ASSIGNMENTS OF ERROR.

First: The Circuit Court of Appeals erred in refusing to consider and pass upon the questions decided by the District Court.

Second: The Circuit Court of Appeals erred in deciding the case on an entirely different theory from that upon which the case was presented for its decision in the oral arguments and the briefs submitted in that Court and by the opinion of the District Court.

Third: The Circuit Court of Appeals erred in holding that "determined under Section 226 (of the Revenue Act of 1918) the tax assessed in 1919 on the taxpayer's original return of March, 1919 to the amount of $302,524.65 less the abatement of $75,461.39, so far as anything appears in the record was correct and there was, therefore, no overpayment", *because* both (1) the Certificate of Overassessment (Rec. p. 31) and (2)

the official Schedule of Overassessment (Rec. p. 37) shows that the original assessment of $302,524.65 was wrongful and excessive in the amount of $156,340.83.

Fourth: The Circuit Court of Appeals erred in failing to hold and rule that the correct amount of the petitioner's taxes for the six months period ended June 30, 1918 was, and is, *only $146,098*, as conclusively shown by the Commissioner's letter of May 7, 1923, in which he officially determined the correct amount of the taxes to be $146,098 (Plaintiff's Exhibit 1; Rec. p. 26).

Fifth: The Circuit Court of Appeals erred in holding that the appellant, petitioner herein, has not sustained the burden of showing that "the Government has money justly belonging to the plaintiff", by reason of the following facts:

1. The official schedule of Refunds and Credits (Rec. p. 37) conclusively shows that the plaintiff actually overpaid its taxes in the amount of $80,879.44 which includes the $74,648.39 sought to be recovered in this suit.

2. The admission of counsel for the Government, in open Court, both in the District Court (Rec. p. 76E) and in the Circuit Court of Appeals to the effect (1) that the Commissioner's Certificate of Overassessment (Rec. p. 31) is a valid document and (2) that the overpayment of the 1918 tax thereby allowed had been credited and applied to alleged taxes for the earlier 1915, 1916 and 1917 after the statute of limitations as to those years had run.

3. The District Court found and ruled that the plaintiff had made out a *prima facie* case on the basis of the Certificate of Overassment (Rec. p. 76E) and the entire opinion of the District Court is predicated on a finding of fact that the petitioner did actually overpay its 1918 taxes.

Sixth: The Circuit Court of Appeals erred in making a new finding of fact to the effect that the Commissioner "made a redetermination of the 1918 tax for the sixth months period from December 31, 1917 to July 1, 1918, which he had a right to do", since the fact in that regard found by the District Court is directly to the contrary.

Seventh: The Circuit Court of Appeals erred in failing to consider the real issues of the case as presented in the pleadings, in the oral arguments and in the briefs.

Eighth: The Circuit Court of Appeals erred in affirming the judgment of the District Court.

V. GROUNDS FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

First: The case involves the interpretation of important Federal statutes which have been the source of much litigation, the meaning of which is unsettled and an interpretation of which, by this Court, in their application to the facts in the case at bar, would be of great public interest and concern.

(1) *Section 3226 R. S., as amended; 26 U. S. C. A. 156;*
(2) *Section 205 of the Revenue Act of 1918, 40 Stat. 1061;*
(3) *Section 226 of the Revenue Act of 1918, 40 Stat. 1075;*
(4) *Section 609 of the Act of 1928, 45 Stat. 875; 26 U. S. C. A. 2609.*

Second: The opinion of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

American Hide & Leather Co. v. *United States*, 284 U. S. 343;
Bonwit Teller & Co. v. *United States*, 283 U. S. 258; 51 S. Ct. 395;
Lewis v. *Reynolds*, 284 U. S. 281; 51 S. Ct. 145.

Third: The opinion of the Circuit Court of Appeals is in conflict with the applicable decisions of the United States Board of Tax Appeals which have been sanctioned by this Court:

Appeal of Henry D. Weed, 2 B. T. A. 84 (no appeal taken);
Appeal of Pasco Robles Mercantile Company, 12 B. T. A. 750;
(*Affirmed C. C. A. Ninth Circuit; 33 Fed. (2) 653.*)
(*Certiorari denied, 280 U. S. 595.*)

Fourth: The opinion of the Circuit Court of Appeals violates the well established rule (1) that Courts of Review will consider only those questions which have been ruled upon by the lower Court and (2) that the parties on appeal must adhere to the theory on which the case was prosecuted or defended in the lower Court.

San Juan Light & Tr. Co. v. *Requena*, 224 U. S. 89;
Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228;
Unites States v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9.

Fifth: The Circuit Court of Appeals erred in ***disregarding the fact*** that the District Court ***found and ruled that the plaintiff had actually overpaid*** its 1918 taxes and that the opinion of the District Court is based ***entirely upon the fact of such overpayment.***

Sixth: The Circuit Court of Appeals erred in holding that upon all the evidence the appellant, petitioner herein, had failed to sustain the burden of proving that it had actually made an overpayment of its 1918 taxes, thus disregarding the following documentary evidence in the record which conclusively proves to the contrary:

(1) The Commissioner's final letter of determination dated May 7, 1923 (Rec. p. 23);
(2) The Schedule of Overassessment approved December 20, 1923 (Rec. p. 37);
(3) The Schedule of Refunds and Credits, approved February 18, 1924 (Rec. p. 37);
(4) Certificate of Overassessment No. 29,852 issued to the petitioner on May 16, 1924 (Rec. p. 31).

Seventh: Throughout the entire proceedings on the case both in the District Court and in the Circuit Court of Appeals there have been manifold errors, irregularities and uncertainties as to the real issues involved in the case with the result that the petitioner has not been granted a fair and just trial and decision of the cause of action for which this suit was brought.

CONCLUSION.

Wherefore your petitioner earnestly prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled *Arthur C. Harvey Company, Plaintiff, Appellant*, v. *John F. Malley, Former Collector of Internal Revenue, and/or Malcolm E. Nichols, Former Collector of Internal Revenue, Defendants, Appellees*, being designated and numbered on its docket *October Term, 1931, No. 2667*, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court to the end that your petitioner may have the relief herein prayed for, and such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Respectfully submitted,

ARTHUR C. HARVEY COMPANY,
by its Attorney, O. WALKER TAYLOR,
11 Beacon Street, Boston, Massachusetts.

AFFIDAVIT OF COUNSEL.

COMMONWEALTH OF MASSACHUSETTS.
SUFFOLK, SS. BOSTON, MASSACHUSETTS, November 18, 1932.

Then personally appeared the above-named O. Walker Taylor, a member of the bar of the Supreme Court of the United States, and being duly sworn deposed and said that he prepared and signed the foregoing petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit; that the same was prepared with the full knowledge, consent and approval, and at the suggestion of the Arthur C. Harvey Company, a corporation with a usual place of business at Boston, Massachusetts; that the facts stated in the said petition are true to the best of

his knowledge and belief; and that there are good, sufficient and just grounds for the issuance of the writ of certiorari therein prayed for.

Before me, FRANK J. LINEHAN, JR.,
[SEAL] *Notary Public.*

My commission expires October 22, 1937.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.

ARTHUR C. HARVEY COMPANY, PETITIONER,

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS, RESPONDENTS.

BRIEF IN SUPPORT OF THE PETITION.

I. STATEMENT OF JURISDICTION.

1. The jurisdiction of this Court is invoked under the Act of February 3, 1925, c. 229, Sec. 1 (43 Stat. 938; 28 U. S. C. A. 347).

2. By an order signed by Mr. Justice Stone, and filed with the Clerk of this Court, on October 24, 1932, the time for the petitioner to apply for a writ of certiorari was extended for thirty days from November 4, 1932 and this petition was seasonably filed within the period as thus extended.

3. The opinions of the Courts below of which a review by this Court is petitioned for are:

(1) The opinion of the District Court for the District of Massachusetts (Rec. pp. 56–59), reported in *50 Fed. (2) 885.*

(2) The opinion of the Circuit Court of Appeals for the First Circuit (Rec. pp. 69–70), reported in *60 Fed. (2) 97*, and

(3) The supplemental written opinion of the Circuit Court of Appeals (Rec. pp. 77–79), as yet unreported.

II. STATEMENT OF THE FACTS AND THE LAWS.

The essential facts of the case, together with the pertinent parts of the applicable statutes have been presented in the petition. Any other facts or statutes requiring consideration are referred to in the argument below. In support of the allowance of the petition the following is respectfully submitted.

III. SUMMARY OF THE ARGUMENT.

I. The Judgment of the Circuit Court of Appeals is directly in conflict with the applicable decisions of this Court.

II. The Judgment of the Circuit Court of Appeals is directly in conflict with the applicable decisions of the Board of Tax Appeals as sanctioned and approved by this Court.

III. The Judgment of the Circuit Court of Appeals violates the well established rule that a Court of review must adhere to the theory upon which the case was presented and decided by the lower Court.

IV. The Judgment of the Circuit Court of Appeals is not supported by the great weight of the evidence as presented in the record.

V. The case involves the interpretation of important Federal statutes which have been the source of much litigation, are still unsettled, and of which an interpretation by this Honorable Court will be of great public interest and concern.

ARGUMENT.

I.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In support of this contention, attention is invited to the comments in the opinions of some of the more recent leading cases decided by this Court as compared to the comments and holdings in the opinion of the Circuit Court of Appeals.

American Hide & Leather Co. v. *United States*, 284 U. S. 343; 52 S. Ct. 154;
United States v. *Michel*, 282 U. S. 656; 51 S. Ct. 284;
Bonwit Teller & Co. v. *United States*, 283 U. S. 258; 51 S. Ct. 395;
Lewis v. *Reynolds*, 284 U. S. 281; 51 S. Ct. 145.

1. On the question of the computation of the tax:

In the case of the American Hide & Leather Company, *supra*, the taxpayer had a fiscal year ending June 30, 1918 exactly as in the case at bar. In commenting upon the method of computing the tax for the six months period under Section 226 of the 1918 Act (40 Stat. 1075), Mr. Justice Stone in that case said:

> "Section 226 of the 1918 act authorizes the calculation of the tax for that part of the fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed*, 2 B. T. A. 84."

The Circuit Court of Appeals in its supplemental opinion (Rec. p. 79) holds that the language above referred to is "obviously dictum" and would produce inequitable results and presents the following illustrations:

> "To illustrate: Let us assume that the plaintiff corporation had a taxable income during the period from June 30,

1917, to January 1, 1918, of $50,000, on which, since it made its return for the year 1917 on the basis of the calendar year, it had already paid a tax under the 1916 Act, and from December 31, 1917, to July 1, 1918, its taxable income was $150,000. Applying the theory of the plaintiff's counsel, it would in such case be taxed on an income of only $100,000 during the period from December 31, 1917, to July 1, 1918, although its taxable income during that period was $150,000. In other words, under such an interpretation of Sec. 226 it would escape taxation on $50,000.

To state the converse of this: Assuming that its taxable income during the last half of the calendar year of 1917 was $150,000, and for the first half of 1918 was only $50,000, the taxpayer under the 1916 Act, making a return for the calendar year of 1917, would have already paid a tax on $150,000 of income; yet, according to the theory of counsel for the plaintiff, its return for the period of the fiscal year falling in 1918 should show a taxable income of $100,000, and as a result he would not only pay a tax on the $50,000 actually earned in the period of the fiscal year falling in 1918, but a double tax on $50,000 more earned in 1917."

Not only is the above language of the Circuit Court of Appeals in conflict with the language of this Court but it is also true that there are no figures in this entire record which show what the actual income of the petitioner was during the six months period. This question was not raised in the District Court and neither the Court nor the parties considered such figures necessary in view of the fact that the defendant admitted in open Court that the Certificate of Overassessment and other documents were valid, all of which were based upon a computation of the tax under Section 205 of the Act as is shown in the Commissioner's official letter of determination (Rec. p. 26).

2. On the question of a suit against the Collector:

The opinion of the Circuit Court of Appeals (Rec. pp. 68-69) comments as follows:

"If the appellant had declared as on an account stated,

or a promise to pay by reason of the certificate of overassessment issued by the collector in May, 1923, as in *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265, we think its action would have to be brought against the United States, as neither of the defendants had anything to do with issuing of the certificate of overassessment or were privy to any promise therein contained, either express or implied, to refund the overpayment."

In the case at bar, the appellant, petitioner herein, did not base its suit on the Certificate of Overassessment, as in the *Bonwit Teller* case, because the Commissioner's letter of December 17, 1929 (Rec. pp. 45-46), clearly states that there was never any overpayment of the 1918 taxes, or, in other words, that the Certificate of Overassessment was erroneously issued. This letter, your petitioner accepted in good faith for what it purports to be—a denial of the claim, made on April 9, 1923, that there had been such overpayment. This suit, therefore, was brought against the defendant Malley, who actually collected the $74,648.39, here in dispute, in the hope and expectation that thereby the plaintiff would be granted opportunity to have the Court determine: (1) whether the Certificate of Overassessment was in fact erroneously issued, (2) whether the Commissioner's letter of December 17, 1929, *supra*, was in fact a bona fide denial that there had been any overpayment, or (3) whether upon all the evidence which the plaintiff was ready, able and offered to present for the consideration of the Court, it had actually and in fact overpaid its 1918 taxes.

(1) As a first form of action, therefore, the plaintiff, petitioner herein, sued on the theory that its claim for refund of April 9, 1923, *supra*, was actually and officially rejected, for the first time, by the Commissioner of Internal Revenue on December 17, 1929. The suit was brought within two years of that first and only denial or disallowance of the claim, as required by Section 3226 of the United States Revised Statutes (26 U. S. C. A. 156), the pertinent part of which is as follows:

". . . No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon

> within that time, nor after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

The opinion of this Court in the case of *United States* v. *Michel, supra*, seems clearly to hold that a suit may be brought upon a rejected claim for refund even though the "disallowance" takes place more than five years from payment, provided such suit is brought within two years of the first actual official rejection or disallowance of the claim. The claim for the refund of the $74,648.39 sought to be recovered in the case at bar was first asserted on April 9, 1923. That claim was never questioned, denied or disallowed until December 17, 1929. Clearly, therefore, the suit was brought "within two years after the disallowance of the part of such claim to which such suit or proceeding relates" as required by the statute. In the *Michel* case, *supra*, Mr. Justice Butler in construing the statute said:

> "By the terms of the statute the period within which the Government consented to be sued commenced at the expiration of such six months, and continued uninterruptedly through the five-year period following the date of payment *and until 'two years after the disallowance'.*" (Italics supplied.)

On the strength of the wording of the statute itself and these comments, your petitioner respectfully submits (1) that the suit was properly brought against the defendant Malley for the recovery of the 1918 overpayment, (2) that it was not limited to a suit against the United States or to an action in the Court of Claims, as was contended by Counsel for the Government before the Circuit Court of Appeals.

(2) As a second form of action the suit was brought against the defendant Malley on the theory of "money had and received" of which the Certificate of Overassessment may or may not be sufficient proof. At the trial of the case the plaintiff was taken completely by surprise because counsel for the Government confused and avoided the issues (1) by repudiating the Com-

missioner's letter of December 17, 1929, *supra*, (2) by admitting that the Certificate of Overassessment was a valid document and (3) by arguing that the plaintiff's only remedy was a suit against the United States "on an allowed claim" brought in the Court of Claims. Upon these admissions the District Court ruled that the plaintiff had made out a ***prima facie*** case and that it was unnecessary for the plaintiff to proceed further by putting in its further proof (Rec. p. 76E). Clearly the District Court accepted jurisdiction of the case.

Even if the Certificate of Overassessment is a valid document and constitutes an allowance of the petitioner's claim of April 9, 1923, as the District Court found and ruled, that fact does not preclude the plaintiff from suing the collector to whom either the "tax" or "the money" was actually paid.

United States Revised Statutes, Sec. 629 (28 U. S. C. A. 41 (5)).
Downes v. *Bidwell*, 182 U. S. 244; 21 S. Ct. 770.
Klump v. *Thomas* (C. C. A. 7th), 162 Fed. 853, 856.

Section 629 of the Revised Statutes, *supra*, as amended, provides:

> "The District Courts shall have original jurisdiction as follows: . . . . . .
>
> Fifth. Of all cases *arising under any law providing for Internal Revenue*, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (R. S. § 563, par. 5, § 629, par. 4; Mar. 3, 1911, c. 231, § 24, par. 5, 36 Stat. 1092.)" (Italics supplied.)

In the case of *Downes* v. *Bidwell, supra*, Mr. Justice Brown interpreted the foregoing section to mean that any actions, arising under an act providing for revenue, might be maintained against the collector "since they are for acts done by a collector under color of his office". Nor, does there seem to be anything in the case of Bonwit Teller & Company, *supra*, to the contrary. While there the suit was actually brought against the United States and based upon the Certificate of Overassessment, there is nothing in that opinion to indicate that the same

suit might not have been brought against the Collector for "money had and received" as "evidenced by" the Certificate of Overassessment.

It is respectfully submitted, therefore, that these findings and ruling of the District Court were binding, and that the Circuit Court of Appeals erred in its foregoing comments and holdings.

3. On the question of recoverable overpayment:

On this question the Opinion of the Circuit Court of Appeals (Rec. p. 69) quotes the following language from the Opinion of this Court in the case of *Lewis* v. *Reynolds, supra:*

> "Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded."

It is respectfully submitted that the above language has absolutely no application to the facts and circumstances in the case at bar. In the case of *Lewis* v. *Reynolds, supra,* taxes for only one year were involved. A claim for refund had been filed on one ground which the Commissioner found should be allowed but in making his examination he found that there were other items for the same year which more than offset the overpayment to which the taxpayer might otherwise have been entitled. The facts in that case are thus clearly distinguishable from those in the case at bar, and it is respectfully submitted that the language of this Court in the *Lewis* v. *Reynolds* case was not intended to mean that where a taxpayer proved an actual overpayment for *one year,* refund might be refused and the overpayment applied to alleged taxes for other years already barred by the statute of limitations. Such an interpretation of the statute would be clearly in conflict with Sections 607 and 609 of the Revenue Act of 1928 (45 Stat. 874, 875; 26 U. S. C. A. 2607, 2609).

For all of the foregoing reasons, therefore, your petitioner respectfully submits that the decision of the Circuit Court of Appeals is directly in conflict with the applicable decisions of this Court.

II.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE BOARD OF TAX APPEALS AS SANCTIONED AND APPROVED BY THIS COURT.

On the matter of the computation of the tax under Section 226 of the Revenue Act of 1918, *supra*, the opinion of the Circuit Court of Appeals has entirely misinterpreted two leading cases of the United States Board of Tax Appeals, one of which is cited in its opinion.

Appeal of Henry D. Weed, 2 B. T. A. 84;
Appeal of Paso Robles Mercantile Company, 12 B. T. A. 750.

The case of the *Appeal of Henry D. Weed supra*, is cited with approval both in the opinion of the Circuit Court of Appeals in the case at bar and also by this Court in the case of the American Hide & Leather Company case, *supra*. The Board of Tax Appeals in that case held that the tax should be computed under Section 226 of the 1918 Act but this ruling by the Board was based upon the following finding of fact in the Weed case:

> "5. In his return for the five months period ended May 31, 1918, the taxpayer reported five-twelfths of his net income for his fiscal period ended May 31, 1918."

Your petitioner contends that the Circuit Court of Appeals entirely disregarded this finding of fact in the Weed case. In the case at bar the Commissioner of Internal Revenue officially determined that the petitioner's total net income for its entire fiscal year ended June 30, 1918, was $495,390.40. If six-twelfths of this amount should be taken as the petitioner's correct income for the six months period exactly as was done in the Weed case, your petitioner's taxes for the six months period would be only $146,098 as was demonstrated and shown to the Circuit Court of Appeals in the appellant's motion (Rec. pp. 89–90). It is thus apparent that this record is sufficiently full and complete to calculate the petitioner's taxes for the six months period either under Section 205 or in the manner prescribed in

the Weed case. But there are, as we have stated above, absolutely no figures upon which such a computation as the opinion of the Circuit Court prescribed can be made. The erroneous return upon which the original assessment of $302,524.65 was made is not shown in the record. The plaintiff below was ready, able and in fact offered to show that the net income reported on the original return of March, 1919 was not the petitioner's true income for the six-months period, as the Circuit Court of Appeals assumed, but actually included what the petitioner conceived to be its income of the entire fiscal year. In the very nature of the case this overlapped or duplicated a portion of the income which was shown in its return for the calendar year ended December 31, 1917. It is respectfully submitted, therefore, that the method of computation under Section 226 as prescribed in the supplemental opinion of the Circuit Court of Appeals (Rec. p. 79) is contrary to the statute, is not supported by the evidence and is inconsistent with the method of computation under that section as prescribed in the appeal of Henry D. Weed, by the Board of Tax Appeals which was sanctioned and approved by this Court in the case of the American Hide & Leather Company, *supra.*

III.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS VIOLATES THE WELL ESTABLISHED RULE THAT A COURT OF REVIEW MUST ADHERE TO THE THEORY UPON WHICH THE CASE WAS PRESENTED TO AND DECIDED BY THE LOWER COURT.

In the case at bar the whole opinion of the District Court is predicated upon the fact that the petitioner *had actually overpaid its 1918 taxes*, while that of the Circuit Court of Appeals is predicated entirely on the fact that the petitioner *did not make such overpayment.* It is respectfully submitted that the fact of the overpayment so clearly found by the District Court was binding upon the Circuit Court of Appeals and that it was limited to issues of fact and of law decided and passed upon by the District Court. It is a universal rule with few exceptions that Courts of Review will consider only those questions which have been presented and ruled upon by the lower Court

and that the parties on appeals must adhere to the theory on which the case was prosecuted or defended in the lower Court.

San Juan Light & Tr. Co. v. *Requena,* 224 U. S. 89;
Tucker v. *Alexander,* 48 S. Ct. 45; 274 U. S. 228;
United States v. *Mitchell,* 46 S. Ct. 418; 271 U. S. 9.

In the case of *Tucker* v. *Alexander, supra,* Mr. Justice Stone said:

> "In our view of the case the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913."

IV.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS NOT SUPPORTED BY THE GREAT WEIGHT OF THE EVIDENCE AS PRESENTED IN THE RECORD.

The holding of the Circuit Court of Appeals to the effect that there was no overpayment of the petitioner's 1918 taxes and that the appellant as plaintiff below had failed to sustain the burden of proof in that regard is clearly in error for the following reasons:

1. The District Court found and ruled that the petitioner had actually overpaid its 1918 taxes as shown both in that Court's finding and ruling during the course of the trial (Rec. p. 76) as well as in its opinion (Rec. p. 59).

2. Counsel for the Government admitted in open Court both in the District Court and before the Circuit Court of Appeals that the Certificate of Overassessment (Rec. p. 31) and the official Schedules of the Commissioner of Internal Revenue (Rec. p. 37), which conclusively show the overpayment, were valid documents and the documents themselves were offered in evidence as defendants' exhibits.

3. The Commissioner's letter of May 7, 1923, is the only official determination of the petitioner's taxes for the six months period and clearly shows that there had been an overassess-

ment of $156,340.83 (Rec. p. 24), of which the $74,638.39 overpayment involved in this suit is a part.

4. The Commissioner's letter of December 17, 1929, in the light of (1) the foregoing finding of fact by the District Court, (2) the admission of counsel for the defendants in open Court and (3) the documents above referred to, is clearly shown to be insufficient to support the conclusion reached by the Circuit Court of Appeals.

It is respectfully submitted, therefore, that no question in regard to whether or not the petitioner had overpaid its taxes for 1918 or in regard to the method of computing the taxes for the six months period was presented for the decision of the Circuit Court of Appeals and that its comments and conclusions on these questions are clearly in error and should be reversed by this Honorable Court.

V.

THE CASE INVOLVES THE INTERPRETATION OF IMPORTANT FEDERAL STATUTES WHICH HAVE BEEN THE SOURCE OF MUCH LITIGATION, ARE STILL UNSETTLED AND OF WHICH AN INTERPRETATION BY THIS HONORABLE COURT WILL BE OF GREAT PUBLIC INTEREST AND CONCERN.

The petitioner respectfully submits that the case at bar presents the following questions which should be decided by this Court:

1. Whether the Circuit Court of Appeals erred in its interpretation of Sections 205 and 226 of the Revenue Act of 1918 as applied to the facts and circumstances in this case.

2. Whether the Circuit Court of Appeals erred in holding (1) that the Commissioner of Internal Revenue had a right to redetermine, in 1929, the petitioner's 1918 taxes, and (2) that the petitioner, plaintiff-appellant below, failed to sustain the burden of proving that there was *an actual overpayment of its 1918 taxes.*

3. Whether the petitioner, plaintiff-appellant below, has a good cause of action against the defendant Malley as Collector of Internal Revenue, to whom the disputed $74,648.39 was actually paid, by virtue of the fact (1) that a proper claim for

refund therefor was seasonably filed, and (2) that Section 609 of the Revenue Act of 1928 provides that the credit and application thereof was "*void*".

4. Whether the Circuit Court of Appeals erred in failing to consider the issues presented (1) in the pleadings, (2) in the opinion of the District Court, and (3) in the oral arguments and in the briefs.

5. Whether the Commissioner's letter of December 17, 1929 (Rec. p. 46) is not, in fact and in law, a "disallowance" of that part of the petitioner's claim for refund of April 9, 1923 (Rec. p. 49), to which this suit relates, so that as to the defendant Malley the action is not barred by the provisions of Section 3226 of the Revised Statutes (26 U. S. C. A. 156).

6. Whether in view of the facts and circumstances of the case the petitioner has had a full and fair adjudication of the cause of action for which the suit was brought.

The opinion of the Circuit Court of Appeals in the case at bar has already been the source of much speculation and interest and an adjudication of the foregoing questions by this Honorable Court would be of great public interest and concern. Particularly is this true as regards the meaning and effect of Section 609 of the Revenue Act of 1928 which declares a credit to an outlawed tax to be void whether or not such credit was made before or after the passage of the Act of 1918. While there have been numerous suits brought as a result of this section, no Court, as yet, has interpreted its full meaning and effect.

Where the Commissioner has determined an overpayment, and had issued a valid certificate therefor, but has wrongfully applied the overpayment, the status of the "overpaid tax" or the "money" is still uncertain. Clearly the Government has money which belongs to the taxpayer. We respectfully submit that this Honorable Court should decide whether or not it was the purpose and intent of Section 609 of the Act that "the tax" or "the money" should be refunded to the taxpayer.

Since the passage of the 1928 Act various theories have been advanced as to the meaning of Section 609. One is that, upon the passage of the 1928 Act, the taxpayer had a right to sue

for "taxes" for the year for which the overpayment was made. Another theory is that the money thus credited is not a tax but represents a sum of money due from the United States. Still another theory is that upon the passage of the Act there arose an *implied trust* either on the part of the collector to whom the money was actually paid or on the part of the United States to hold the money for the benefit of the person to whom it is rightfully due. See:

United States v. *Wardwell*, 172 U. S. 48; 19 S. Ct. 86.

The Commissioner of Internal Revenue, in the instant case, failed squarely to meet these issues. When the 1928 Act was passed a petition was filed on the ground that the credits were void and the originally allowed refund of the 1918 tax should be made to the extent of the wrongful credits. In order to avoid this issue the Commissioner *denied that there had ever been any overpayment of the 1918* tax. By the letter of December 17, 1929, he repudiated his previous determination, the Certificate of Overassessment and all of the other official documents. At the trial, however, Counsel for the Government repudiated the letter of December 17, 1929. The District Court held and ruled that the Certificate of Overassessment was valid and that the Government was bound by the admission of that fact made in open Court. The Circuit Court of Appeals, in turn, disregarded all these things and seems to rest its opinion solely on the letter of December 17, 1929, but nevertheless holds that the letter does not constitute a rejection of the original claim for the $74,648.39.

The defendants' answer in this case (Rec. pp. 9–10) raises no issue whatever in regard to the matter of filing a claim for refund for the years 1915, 1916 and 1917, the issue upon which the decision of the District Court rests. They contain no reference to the question of the computation of the petitioner's taxes under Section 226 of the Act, as decided by the Circuit Court of Appeals. No mention of either of these issues was made in the oral arguments and briefs in either Court. The result is that the petitioner at every turn in the proceedings has been taken completely by surprise, and there has never been a meeting of the minds of the parties or of the Courts as

to the merits of the cause of action for which the suit was brought.

In the case of *Howbert* v. *Penrose*, 38 Fed. (2) 577, 581, the Circuit Court of Appeals for the Tenth Circuit, McDermott, Circuit Judge, said:

> " The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to recover this tax. The defendant concedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc., R. Co.* v. *United States*, 254 U. S. 141, 41 S. Ct. 55, 56, 65 L. Ed. 188), *the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is that substance should be given the right of way over form.*
>
> . . . . . .
>
> The claim for refund should have been more particular; *but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer.* The derelictions of the parties are about equal, and if the matter is at large, *the tax ought to be repaid, for concededly the government has no right to it.*" (Italics supplied.)

CONCLUSION.

WHEREFORE, under all of these unusual circumstances, it is respectfully submitted that the petition for a writ of *certiorari* should be granted.

By O. WALKER TAYLOR,
Attorney for the Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 537.

ARTHUR C. HARVEY COMPANY,
Petitioner,

v.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS,
Former Collectors,
Respondents.

BRIEF FOR THE PETITIONER.

O. WALKER TAYLOR,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 537.

ARTHUR C. HARVEY COMPANY, PETITIONER,

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS, RESPONDENTS.

BRIEF FOR THE PETITIONER.

STATEMENT OF JURISDICTION.

This cause is before this Honorable Court on a writ of certiorari, granted by an order entered herein on January 9, 1933 (Rec. p. 100), to review a decision of the United States Circuit Court of Appeals for the First Circuit, affirming a judgment rendered against the plaintiff, petitioner herein, by the United States District Court for the District of Massachusetts.

The jurisdiction of this Court was invoked by a petition for a writ of certiorari, seasonably filed on December 3, 1933, as provided by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938; 28 U. S. C. A. § 347).

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (Rec. pp. 56–59) was rendered on October 31, 1931 and is reported in *52 Fed. (2) 885–886.*

The opinion of the Circuit Court of Appeals affirming the judgment of the District Court (Rec. pp. 63–70) was rendered on June 27, 1932, and is reported in *60 Fed. (2) 97–101.* A petition

for a rehearing (Rec. pp. 71–76) was seasonably filed and was denied by an order of that Court on August 5, 1932 (Rec. p. 88).

A supplemental written opinion (Rec. pp. 85–87), denying *The Appellant's Motion To Be Heard In Oral Argument* (Rec. pp. 88–99), was rendered by the Circuit Court of Appeals on October 11, 1932 and is reported in *61 Fed. (2) 365.*

SUMMARY OF THE CASE.

1. The petitioner, on March 14, 1919, having always kept its books of account on the basis of a *fiscal year* ending June 30th, filed an original return pursuant to Section 212 (b) of the Revenue Act of 1918 (40 Stat. 1064; p. 38, *infra*), upon which the reported income was not properly adjusted with the income reported on its return for the calendar year 1917; and, thereafter, seasonably filed *amended returns upon which it reported income for the entire fiscal year ending June 30, 1918 and computed its taxes for the six-months period ending June 30, 1918, by taking six-twelfths of the tax computed upon the income for the entire fiscal year,* in accordance with Section 205 (a) of the 1918 Act (40 Stat. 1061; p. 38, *infra*).

2. On the basis of *the original return*, taxes amounting to $302,524.65 (Rec. p. 31) were assessed, of which the petitioner paid $227,063.28 to the defendant Malley (Rec. p. 54), in three installments, of which the first amounting to $60,000 was paid on March 19, 1919; the second amounting to $94,466.78 was paid on July 1, 1919; and the third amounting to $72,596.50 was paid on September 17, 1919.

3. On April 10, 1923 the petitioner filed a timely claim for refund of $107,826.61 of the taxes it had paid for the six months period in 1918, which also requested that $48,563.39 of the asserted overpayment for 1918 should be credited to taxes tentatively determined for the years 1915, 1916 and 1917 (Rec. pp. 47–49).

4. The Commissioner of Internal Revenue examined and considered the returns and claims thus filed and thereupon (1) *accepted and approved the amended return,* (2) determined the original assessment to be excessive in the amount of $156,340.83, (3) abated the $75,461.39 of the assessment which had

not been paid, and (4) *officially allowed the petitioner's claim for overpayment in the amount of $80,879.44*, all of which is clearly shown in the record by the following documents:

(1) The Commissioner's final letter of determination dated May 7, 1923 (Rec. p. 23);

(2) The Schedule of Overassessment approved by the Commissioner on December 20, 1923 (Rec. p. 37);

(3) The Schedule of Refunds and Credits approved by the Commissioner on February 18, 1924 (Rec. p, 37); and

(4) The Certificate of Overassessment, No. 29,852, issued to the petitioner by the Commissioner on May 16, 1924 (Rec. p. 31).

5. Thereupon the defendant Nichols, as Collector of Internal Revenue, acting under instructions from the Commissioner (Rec. p. 37), credited and applied $74,648.39 of the allowed overpayment of $80,879.44 to alleged underpayments of the petitioner's taxes for the years 1915, 1916 and 1917, after the expiration of the five-year period of limitation for the assessment and collection of any such taxes for those years, as provided in Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265; p. 39, *infra*).

6. On July 27, 1929, the petitioner filed a petition with the Commissioner of Internal Revenue (Rec. p. 41) setting forth that the $74,648.39, as previously allowed, should be refunded (1) since a sufficient claim therefor had been seasonably filed on April 10, 1923 (Rec. p. 39), and (2) since the credit of said sum to alleged taxes for the years 1915, 1916 and 1917 was *"void" under the provisions of Section 609 of the Revenue Act of 1928 (45 Stat. 875; 26 U. S. C. A. § 2609;* p. 41, *infra*).

7. By a letter dated December 17, 1929 (Rec. pp. 49–50), the Commissioner of Internal Revenue refused to refund the $74,648.39 on the ground that (1) his previous determination, which had been made under Section 205 (a) of the Revenue Act of 1918 (40 Stat. p. 1061; p. 38, *infra*), and his allowance of the $80,879.44 overpayment, *were erroneous*, and (2) the proper method of computing the petitioner's taxes for the six-months period "is in accordance with Section 226 of the Revenue Act of 1918" (40 Stat. 1075; p. 39, *infra*).

8. This suit was brought by a writ dated January 25, 1930 (Rec. p. 1) to recover the sum of $74,648.39, with interest, which was within two years of the Commissioner's letter of disallowance dated December 17, 1929, as provided in Section 3226 of the United States Revised Statutes (26 U. S. C. A. § 156).

9. The petitioner, plaintiff-appellant below, seeks recovery of the said sum ($74,648.39) either (1) as *1918 taxes wrongfully collected and credited*, as alleged in Count I of the plaintiff's declaration (Rec. pp. 3–8), or, (2) as *"money had and received" by the defendant* Malley, as alleged in Count II of the plaintiff's declaration (Rec. p. 8).

10. The defendants answered separately by way of general denials (Rec. pp. 9–10) setting forth no special defenses (1) as to the jurisdiction of the District Court, (2) as to any statute of limitations, (3) as to any failure of the plaintiff to comply with the statutes and regulations in regard to filing sufficient claim for refund, or (4) as to any matters alleged in the plaintiff's declaration.

11. The District Court, *in the course of the trial*, ruled that the plaintiff had made out a prima facie case on the basis of the Certificate of Overassessment and the other documents showing the overpayment, which counsel for the Government admitted in open court to be valid documents (Rec. p. 16); but in its written opinion the District Court decided the whole case *"on a question which was not discussed at the hearing or noticed in the briefs"* (Rec. p. 82), and held (Rec. p. 59) as follows:

> "In the case before the court no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 or 1917. As no refund could be made, the credit is not void."

12. The opinion of the Circuit Court of Appeals entirely disregards (1) *the fact that the District Court found and ruled that the petitioner had actually overpaid its 1918 taxes* and (2) all of the documents mentioned in paragraph 4 above, which were admitted, in open court, to be valid and which conclusively show the Commissioner's official determination of the overpayment; and in its opinion (Rec. p. 70) that Court holds as follows:

"Determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65, less the abatement of $75,461.39, so far as anything appears in the record, was correct, and there was, therefore, no overpayment. At least the record does not disclose any error. The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money justly belonging to the plaintiff. This burden the appellant has not sustained in this case."

. . . . . .

"In other words, there was no overassessment, and therefore the refunding of that part of the alleged overassessment which was on the books of the collector applied to prior tax liabilities was denied, because no such overassessment and overpayment occurred."

STATUTES INVOLVED.

The statutes involved, the pertinent parts of which are set forth in the appendix (pp. 38–42, *infra*), are as follows:

Revenue Act of 1918.

Section 212 (b), 40 Stat. p. 1064.
Section 205 (a), 40 Stat. p. 1061.
Section 226, 40 Stat. p. 1075.

Revenue Act of 1921.

Section 250 (d), 42 Stat. p. 265.
Section 1313, 42 Stat. p. 313.

Revenue Act of 1928.

Section 609, 45 Stat. 875; 26 U. S. C. A. § 2609,

United States Revised Statutes.

Section 629 (4), 36 Stat. 1092; 28 U. S. C. A. § 41 (5).
Section 3226, as amended, 44 Stat. 116; 26 U. S. C. A. § 156.
Section 3228, as amended, 45 Stat. 878; 26 U. S. C. A. § 157.

SPECIFICATION OF ERRORS.

The manifold errors in the courts below have been specified or assigned in the petition for certiorari (pp. 10–12), and are here omitted in the interest of brevity because in its ultimate analysis the whole case, on its merits, seems to present only three fundamental questions for the decision of this Honorable Court, to wit:

THE QUESTIONS PRESENTED.

First: **Whether the petitioner actually made the overpayment of its 1918 taxes and sustained the burden of so proving.**

Second: **Whether the plaintiff is precluded from recovery by reason of the fact that its claim for refund of April 10, 1923 contained a request that a portion of the claimed overpayment should be credited to taxes for the years 1915, 1916, and 1917.**

Third: **Whether the plaintiff, petitioner herein, has a good cause of action against the defendant Malley, either (1) for refund of 1918 taxes or (2) for money had and received.**

SUMMARY OF ARGUMENT.

I. Upon this record the plaintiff fully sustained the burden of proving that it actually made an overpayment of its taxes for the six months period ended June 30, 1918.

1. The documentary evidence, the admissions of Government Counsel in open court and the finding of fact in that regard by the District Court, conclusively prove the overpayment.

2. The correct computation of the petitioner's taxes either under Section 205 (a) or Section 226 of the 1918 Act results in a tax liability, for the six months period, of only $146,098, as against $227,063.28 actually paid.

3. The Commissioner did not in fact, nor did he as a matter of law, have "a right to", in 1929, redetermine the 1918 tax.

II. The plaintiff is not precluded from recovery by reason of the fact that its claim for refund of April 10, 1923 requested that a portion of the asserted overpayment should be credited to taxes for the years 1915, 1916 and 1917.

1. As a matter of law the claim for credit of the $48,563.39 is not binding upon the petitioner.

2. As a matter of equity the claim for credit of the $48,563.39 is ineffectual to create an estoppel.

III. The plaintiff, petitioner herein, has a good cause of action against the defendant Malley, and the suit was properly and seasonably brought.

1. A good and seasonable cause of action lies against the defendant Malley under Count 1 of the plaintiff's declaration for 1918 taxes wrongfully collected.

2. A good and seasonable cause of action lies against the defendant Malley for "money had and received" under Count II of the plaintiff's declaration.

3. The Government's objections (1) that the suit was not seasonably brought and (2) that the District Court did not have jurisdiction are untenable.

ARGUMENT.

I.

UPON THIS RECORD THE PLAINTIFF FULLY SUSTAINED THE BURDEN OF PROVING THAT IT ACTUALLY MADE AN OVERPAYMENT OF ITS TAXES FOR THE SIX MONTHS PERIOD ENDED JUNE 30, 1918.

In support of the above contention the petitioner respectfully submits to this Honorable Court the following:

1. The documentary evidence, the admissions of Government Counsel, and the finding of fact in that regard by the District Court, conclusively prove the overpayment.

In passing upon the question of whether or not the petitioner actually overpaid its 1918 taxes the attention of this Honorable Court is respectfully invited to the following documentary evidence in the record all of which conclusively shows that the

Circuit Court of Appeals erred in holding that there had been no overassessment or overpayment of the petitioner's taxes for the six months period:

1. The letter of May 7, 1923 (Rec. p. 23), the only official statutory determination of the petitioner's taxes for the six months period that the Commissioner has ever made, which conclusively shows that the original assessment of $302,524.65 was erroneous and excessive in the amount of $156,340.83;

2. The Schedule of Overassessment (Rec. p. 37), dated December 20, 1923, on which the Commissioner confirmed the overassessment of $156,340.83 and officially allowed the abatement of $75,461.39 thereof which had not been paid;

3. The Schedule of Refunds and Credits (Rec. p. 37), approved and signed February 18, 1924, which shows that the Commissioner officially allowed the petitioner an overpayment of its taxes for the six months period in the amount of $80,879.44; and

4. The official Certificate of Overassessment No. 29,852 (Rec. p. 31) which shows the overassessment of $156,340.83 and which was issued to the petitioner on May 16, 1924 (Rec. p. 55).

The Commissioner's letter of May 7, 1923 was presented in evidence as plaintiff's exhibit, while the Certificate of Overassessment and the two schedules above referred to were, as stated above, admitted in open Court by counsel for the Government to be valid documents (Rec. p. 16) and offered in evidence as defendant's exhibits. In addition to the documents themselves, the District Court found and ruled that the plaintiff had made out a "prima facie case", or in other words that the Certificate of Overassessment and the other documents sufficiently established the fact of the overpayment (Rec. p. 16).

It is obvious that the whole opinion of the District Court is predicated *upon the finding of fact that the petitioner had actually overpaid its 1918 taxes*, while that of the Circuit Court of Appeals is predicated entirely *upon the holding that the petitioner did not make such overpayment.*

It is a universal rule with few exceptions that Courts of Re-

view will consider only those questions which have been presented and ruled upon by the lower Court and that the parties on appeal must adhere to the theory on which the case was prosecuted or defended in the lower Court.

San Juan Light & Tr. Co. v. *Requena*, 224 U. S. 89; 32 S. Ct. 399.
Tucker v. *Alexander*, 275 U. S. 228; 48 S. Ct. 45.
United States v. *Mitchell*, 271 U. S. 9; 46 S. Ct. 418.

In the case of *San Juan Light and Transit Company, supra*, Mr. Justice Van Devanter said:

> "Each party, without objection from the other, introduced evidence bearing upon that question; and . . . there was no exception. . . . Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

It is respectfully submitted that the fact of the overpayment, so clearly found by the District Court upon sufficient evidence (p. 8 *supra*), was binding upon the Circuit Court of Appeals and that it was limited to the question of law decided and passed upon by the District Court.

2. The Correct Computation of the Petitioner's Taxes either under Section 205 (a) or Section 226 of the 1918 Act Results in a Tax Liability, for the Six Months Period, of only $146,098 as against $227,063.28 actually paid.

As pointed out in the opinion of the Circuit Court of Appeals (Rec. p. 69), the Commissioner's final determination of the petitioner's taxes for the six-months period, as shown in his letter of May 7, 1923 (Rec. p. 23), was made under Section 205 (a) of the Revenue Act of 1918 (40 Stat. p. 1061; p. 38, *infra*), while in the letter of disallowance dated December 17, 1929 (Rec. p. 49) the Commissioner states that the previous determination and allowance of the overpayment were erroneous and that the computation should be made under Section 226 of the 1918 Act (40 Stat. p. 1075; p. 39, *infra*). No such *computation*

of the taxes, under Section 226, if made by the Commissioner, is presented anywhere in this record. Nor is the petitioner's original return shown in the record.

As a matter of arithmetic it is entirely immaterial whether the petitioner's taxes for the six-months period ended June 30, 1918 be computed under Section 205 (a) or under Section 226 of the Act of 1918. Either computation, correctly made, conclusively shows that the original assessment of $302,524.65 was excessive in the amount of $156,340.83 and *that the petitioner's true tax liability for the period is only $146,098 as against $227,063.26 actually paid.*

We respectfully submit that the purpose or intent of Congress as embodied in the two sections is this:

1. Section 205 (a) prescribes the method to be followed by a corporation, which at that time had an established fiscal method of accounting which it did not wish to change, in making the transition by its *first return* under the 1918 Act, from the *calendar method* of reporting income to *the fiscal method,* as required by Section 212 (b) of the 1918 Act. 2. Section 226 prescribes the method to be followed, at any time, either by an individual or a corporation, where the taxpayer *changes his or its method of accounting, either from a calendar year basis or from a fiscal year basis, with the permission of the Commissioner,* in making the transition, of reporting income, from his or its old method to the new.

House Report No. 767; 65th Congress, Second Session; pp. 4, 14.

Senate Document No. 391; 65th Congress, Second Session, p. 3.

American Hide and Leather Co. v. *United States,* 284 U. S. 343; 52 S. Ct. 154.

Appeal of Henry D. Weed, 2 B. T. A. 84.

Appeal of Coghlin Electric Company, 3 B. T. A. 1071.

Congress of course recognized that if a corporation with an established fiscal method of accounting which it did not wish to change made its first return in strict compliance with Section 212 (b) of the 1918 Act and returned its gross income and deductions for the entire fiscal year, the return would overlap

and include a portion of the income already reported on its calendar year return and would thus result in a double tax on his first return under the 1918 Act.

House Report No. 767, supra, at page 14, contains the following comment on Section 212 (b) of the Act:

> "Under the present law corporations having a fiscal year are required to make return on the 1st day of the third month following the close of the fiscal year."

House Report No. 767, supra, at page 4, contains the following comment on Section 226 of the Act:

> "If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the prosions of Section 226".

Senate Document No. 391, supra, at page 3, contains the following comment on Section 205 of the Act:

> "Section 205 provides the method of determining the tax where parts of the fiscal year of the taxpayer are taxable at different rates. Under the old law the income was prorated and the rates for the different years were then applied. Under the new law the tax is computed separately for the full year under the rates for both years and then the tax is prorated. The new law allows the individual income taxpayer the privilege of selecting any fiscal year as his taxable year. Heretofore he had no option; his taxable year was the calendar year."

In the American Hide and Leather Company case, *supra,* this Court held that the taxpayer was not bound by its erroneous return and prescribed the method of computing its taxes for a six months period under Section 226 of the 1918 Act. Mr. Justice Stone, who delivered the opinion of the Court, said:

> "Section 226 of the 1918 Act authorizes the calculation of the tax for that part of a fiscal year falling between the beginning of the calendar year and the end of the fiscal

year by the apportionment of gross income and deductions for the fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed*, 2 B. T. A. 84."

As to the two appeals cited above we respectfully submit that the Board of Tax Appeals holds thus: A taxpayer with a *fiscal method of accounting*, which it did not wish to change, was authorized to make the transition from the calendar year basis of *reporting income*, as the earlier statute required, to the fiscal year basis, as Section 212 (b) of the 1918 Act (p. 38, *infra*) required, in either of two ways which the Commissioner did not have authority to change: 1. If the taxpayer *made a return* for the fractional portion of its fiscal year falling in 1918 it was authorized to compute its taxes for that period under Section 226 of the 1918 Act (p. 39, *infra*), whether the income reported *on that return* was (1) its *actual income* during the months involved, or (2) the *proportionate part of net income for the entire fiscal year*. 2. If the taxpayer made a return of the income for its *entire fiscal year* beginning in 1917 and ending in 1918, it was *required* to compute its taxes for the fractional period under Section 205 (a) of the 1918 Act by taking that proportion of the total tax computed on the net income for the entire fiscal year which the fractional period falling in 1918 bore to the entire fiscal year.

In the case at bar, both in its *erroneous original return* and in its corrected or amended returns which the Commissioner accepted and approved (Rec. p. 26), the petitioner adopted the latter method. It did not make a return for the six months period. Both of the taxpayers, in the appeals cited above, *adopted the former method*, or made a *separate return* for the fractional period, which the Board held the Commissioner had no authority to change.

In the Appeal of Henry D. Weed, *supra*, the Board found (1) and ruled (2) as follows:

> (1) "5. In his return for the five months' period ended May 31, 1918, the taxpayer reported five-twelfths of his net income for his fiscal period ended May 31, 1918."
>
> . . . . . .

(2) "The Commissioner holds that section 205 (a) of the taxing statute applies to the instant taxpayer. We do not think that the section has application *since it applies to the case of a taxpayer making a return for a fiscal year beginning in 1917 and ending in 1918.* This taxpayer did not make a return for the fiscal year beginning in 1917 and ending in 1918. He had made a return of his income to December 31, 1917, inclusive, and had paid the taxes imposed by prior taxing acts upon that income." (Italics supplied.)

In direct conflict, we submit, with the decision of this Court in the American Hide and Leather Company case, and with the decisions of the Board of Tax Appeals, *supra*, the Circuit Court of Appeals in its opinion (Rec. pp. 86–87) said:

"*But the question of how the tax should be computed under Sec. 226 was not in issue in the American Hide and Leather Company case, and the language in the opinion on which counsel relies, being obviously dictum, should not control this court, since it is not only contrary to the language of the statute, but would produce inequitable results.*

To illustrate: Let us assume that the plaintiff corporation had a taxable income during the period from June 30, 1917, to January 1, 1918, of $50,000, on which, since it made its return for the year 1917 on the basis of the calendar year, it had already paid a tax under the 1916 Act, and from December 31, 1917, to July 1, 1918, its taxable income was $150,000. Applying the theory of the plaintiff's counsel, it would in such case be taxed on an income of only $100,000 during the period from December 31, 1917, to July 1, 1918, although its taxable income during that period was $150,000. In other words, under such an interpretation of Sec. 226 it would escape taxation on $50,000.

To state the converse of this: Assuming that its taxable income during the last half of the calendar year of 1917 was $150,000, and for the first half of 1918 was only $50,000, the taxpayer under the 1916 Act, making a return for the calendar year of 1917, would have already paid a tax on $150,000 of income; yet, according to the theory of

counsel for the plaintiff, its return for the period of the fiscal year falling in 1918 should show a taxable income of $100,000, and as a result he would not only pay a tax on the $50,000 actually earned in the period of the fiscal year falling in 1918, but a double tax on $50,000 more earned in 1917.

Nothing more is needed to show that such could not have been the intent of Congress, when it said in Sec. 226 that, if a change were made from a calendar year to a fiscal year, 'a separate return should be made for the period between the close of the last calendar year for which a return was made and the date designated as the close of the fiscal year'." (Italics supplied.)

The petitioner, in the case at bar, *has never changed its method of accounting*, which is the *change* contemplated in the statute. It has always kept its books of account on the basis of a fiscal year ending June 30th. It only *changed* its method of reporting income, as it was required to do by Section 212 (b) of the Act of 1918 (40 Stat. 1064; p. 38, *infra*).

Petitioner's net income for the entire fiscal year ended June 30, 1918 as determined by the Commissioner was $495,390.40 (Rec. p. 25). Six-twelfths or one-half of that sum amounts to only $247,695.20, which your petitioner respectfully submits was its true and correct statutory net income for the six months' period whether its taxes be computed under Section 205 (a) or under Section 226 of the 1918 Act. It is inconceivable that an assessment of $302,524.65 can properly be made on a statutory net income of only $247,695.20. Obviously, therefore, the Circuit Court of Appeals was clearly in error (Rec. p. 70) in holding that:

> "In other words, there was no overassessment, and therefore the refunding of that part of the alleged overassessment which was on the books of the collector applied to prior tax liabilities was denied, because no such overassessment and overpayment occurred."

Furthermore, there are no figures in this entire record upon which any such computation of the taxes under Section 226 of the Act can be made, in accordance with the method as above

prescribed by the Circuit Court of Appeals; on the other hand, there are sufficient figures in the record to compute the petitioner's taxes for the six months period either under Section 205 (a) of the Act, as the Commissioner did in 1923 (Rec. pp. 23–26) or, in accordance with the method of computation, under Section 226 of the Act, as prescribed both by this Court and the Board of Tax Appeals in the cases above cited. In the Commissioner's letter of May 7, 1923 (Rec. pp. 23–26), the petitioner's net income for the entire fiscal year, as finally determined by the Commissioner, amounts to $495,390.40 (Rec. p. 25). The petitioner admits that this figure is correct. One-half of this sum, therefore, is the only figure necessary properly to compute the taxes for the six months period under Section 226.

It is respectfully submitted, therefore, that the computation of the petitioner's taxes under Section 205 (a) of the Act showing its true tax liability, for the six-months period ended June 30, 1918 to be $146,098, was correct and proper, as alleged in paragraghs 8 and 9 of the plaintiff's declaration (Rec. pp. 4, 5) and as evidenced by the Commissioner's letter of May 7, 1923 (Rec. p. 23), and the Certificate of Overassessment (Rec. p. 31) which counsel for the Government admitted in open Court at the trial to be a valid document.

3. The Commissioner did not in fact, nor did he, as a matter of law, have "a right to", in 1929, redetermine the 1918 tax.

The opinion of the Circuit Court of Appeals (Rec. p. 69) states:

> "The record shows that when the second claim for refund was filed in July, 1929, the Commissioner, apparently under advice of counsel, made a redetermination of the 1918 tax for the six months from December 31, 1917, to July 1st, 1918, which he had a right to do, though he could not collect any additional tax, *Lewis* v. *Reynolds*, *supra*, and found that the previous assessment in May, 1923, which showed an overpayment of $74,648.39 was erroneous, the former computation having been based on Section 205 of the 1918 Act."

The above comments seem to be based entirely upon the

Commissioner's letter of December 17, 1929 (Rec. p. 50). The petitioner respectfully submits that the letter of December 17, 1929 was neither in fact nor in law such a "redetermination" of the tax as the statute requires. Usually a bona fide determination of a tax by the Commissioner of Internal Revenue sets forth the detailed figures in the form of the Commissioner's letter of May 7, 1923 (Rec. p. 23).

An examination of the Certificate of Overassessment (Rec. p. 31) will show that the Commissioner's office again indicated its approval of the refund of $74,648.39 to the plaintiff on September 28, 1929, but that this action was cancelled by the General Counsel on December 9, 1929. At that time, however, neither the General Counsel nor any other administrative officer *had the right*, under the applicable statutes, to review the Commissioner's allowance.

Section 1313 of the Revenue Act of 1921 (42 Stat. 313; p. 40, *infra*), which was in force at the time the Commissioner made his only official determination of the tax on May 7, 1923, provides as follows:

"Administrative Review."

> "Sec. 1313. That in absence of fraud or mistake in mathematical calculation, the findings of fact in and the decision of the Commissioner upon (or in case the Secretary is authorized to approve the same, then and after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by any other administrative officer, employee, or agent of the United States."

The letter of December 17, 1929, was nothing more or less than an attempt on the part of the General Counsel's office to avoid the obvious effect, upon the erroneous credits, of Section 609 of the 1928 Act (p. 41, *infra*). However, when the suit came to trial the defense put in evidence the Certificate of Overassessment to sustain the contention that the plaintiff was suing on an "allowed claim" and was limited to a suit against the United States in the Court of Claims. It is self-evident that if the Commissioner's supposed redetermination in 1929 is sound in law and true in fact, then neither the Certificate of Overassess-

ment (Rec. p. 31), the Schedule of Overassessment (Rec. p. 37), nor the Schedule of Refunds and Credits (Rec. p. 37) are valid documents.

Nor could the Commissioner himself, in 1929, redetermine your petitioner's 1918 taxes, because more than five years had expired, after the return for that year had been filed, as provided in Section 250 (d) of the Revenue Act of 1921 (45 Stat. 265; p. 39, *infra*), to wit:

> "The amount of income, excess-profits, or war-profits taxes due under any return made under this Act—and the amount of any such taxes due—under prior income, excess-profits or war profits tax Acts—*shall be determined* and assessed *within five years after the return was filed*, unless the Commissioner and the taxpayer consent in writing to a *later determination, assessment and collection of the tax.*" (Italics supplied.)

There is no evidence that the petitioner and the Commissioner of Internal Revenue ever signed any waiver or agreement that any determination or redetermination of the petitioner's 1918 taxes might be made more than five years from the time the return was filed.

But, assuming that the Commissioner did make a redetermination of the 1918 taxes in 1929, *which this record does not disclose*, the account for 1918 had then been closed, on the basis that the petitioner's total tax liability for that year was only $146,098. The Commissioner could not, in 1929, reopen the account without *creating a new liability on account of* 1918 taxes by making a new assessment. But any such new assessment would be in direct violation of Section 250 (d) of the Revenue Act of 1921, *supra*. Nor could the Commissioner, in 1929, even if such liability existed, credit back or reapply, to the 1918 account, the $74,648.39 which then stood on the collector's books as, and occupied the status of, a sum collected or paid on account of taxes for the years 1915, 1916 and 1917; because that recredit and reapplication would be in violation of Section 609 of the Revenue Act of 1928 (p. 41, *infra*). Stated in terms of its ultimate effects, the opinion of the Circuit Court of Appeals holds that in 1929 the Commissioner had a right *to redetermine*,

recreate, and reassess a liability for the year 1918, and to collect a tax thereon, by way of a credit, *which liability,* by his Certificate of Overassessment issued in 1924, *the Commissioner himself had officially and finally declared did not exist.*

The petitioner respectfully submits that the opinion of this Court in the case of *Lewis* v. *Reynolds, 284 U. S. 281, 51 S. Ct. 145,* cited in the opinion of the Circuit Court of Appeals, does not support its above holding.

As a matter of law, therefore, the petitioner respectfully submits that the Circuit Court of Appeals was clearly in error in holding that the Commissioner "had a right", in 1929, to "redetermine" the taxes for the six months period ending June 30, 1918, and to deny "the refunding of that part of the alleged overassessment which was on the books of the Collector applied to prior tax liabilities".

The petitioner respectfully submits, therefore, (1) that it sufficiently sustained the burden of proving that it actually overpaid its taxes for the six-months period ended June 30, 1918, (2) that the Circuit Court of Appeals erred in all of its comments and holdings to the contrary.

II.

THE PETITIONER IS NOT PRECLUDED FROM RECOVERY BY REASON OF THE FACT THAT ITS CLAIM FOR REFUND OF APRIL 10, 1923 REQUESTED THAT A PORTION OF THE OVERPAYMENT SHOULD BE CREDITED TO TAXES FOR THE YEARS 1915, 1916 AND 1917.

The petitioner's claim of April 10, 1923, in which it requested refund of $107,826.61 (Rec. p. 49), also requested that $48,563.39 of the overpayment should be credited to additional taxes for the years 1915, 1916 and 1917, *which had merely been proposed for assessment* (Rec. p. 48). At that time, however, the statute of limitations had already run against the assessment and collection of any taxes for the years 1915, 1916 and 1917, as provided in Section 250 (d) of the Revenue Act of 1921 (42 Stat. 264: p. 39, *infra*), since it was then more than *"five years* after the date when" the returns for all of those years had been filed (Rec. p. 54).

The fact that the plaintiff had thus requested that a portion

of the 1918 overpayment be credited to taxes for the earlier years was not set forth as a special defense in the defendants' answers or referred to in the briefs or oral arguments in either of the Courts below. Both opinions below comment on this fact and seem to raise some questions as to the legal or equitable effects of the claim for the credit, as against the petitioner; thus it may be urged by the Government that the claim for credit operates as an estoppel and precludes the plaintiff from objecting to the wrongful credit of the $74,648.39 to taxes for the earlier years.

1. As a matter of law the claim for credit of the $48,563.39 is not binding on the petitioner.

In support of this contention the petitioner respectfully submits the following:

(1) The request for credit was made after the period of limitations for the assessment and collection of any taxes for the years 1915, 1916 and 1917 had already expired, as provided in Section 250 (d) of the Revenue Act of 1921 (p. 38, *infra*).

(2) Obviously the request for credit of $48,563.39 to the earlier years was based upon the petitioner's adjustment of the 1918 with the 1917 taxes resulting in an overpayment of $107,826.61 for the six months period ended June 30, 1918, whereas the Commissioner's adjustment resulted in an overpayment of only $80,879.44 of which, without notice or opportunity to be heard, he credited $74,648.39 to the earlier years.

(3) There is no evidence in the entire record to show that the Commissioner of Internal Revenue *at any time made a determination* of the plaintiff's taxes for the years 1915, 1916 and 1917 or to show that the petitioner at any time actually owed $74,648.39 additional taxes for those years.

(4) The Commissioner's letter of final determination for the years 1915, 1916 and 1917, showing the $74,648.39 to be due, *is not shown in this record, if any such letter was ever issued*, and there is no other evidence in the record which shows that the Commissioner actually made the assessment of the $74,648.39, or that he at any time made

demand or gave notice that such additional taxes had been determined and would be assessed and collected.

(5) There is no evidence in the record which shows that the petitioner and the Commissioner *at any time signed a waiver with regard to the assessment and collection of any additional taxes for the years 1915, 1916 and 1917, or that the petitioner ever gave a bond or in any way extended* the five year period of limitation for the assessment and collection of such taxes.

(6) There is no evidence in the record which shows that the petitioner at any time was granted the right to be heard or make any protest in regard to any assessment and collection of the $74,648.39 additional taxes for the years 1915, 1916 and 1917, before the credit thereof was made.

(7) There is no evidence in the record which shows that the petitioner at any time filed any claim for abatement of any taxes assessed or demanded for the years 1915, 1916 and 1917 or that the collection of any of its taxes for those years "was stayed" within the meaning of Section 611 of the Act of 1928 (26 U. S. C. A. § 2611).

Furthermore, the petitioner begs to explain to this Honorable Court that the foregoing statements as to "what evidence is not in the record" are not purely *technical.* At the trial in the District Court, the plaintiff was *ready, able and willing to show by competent evidence* that the Commissioner of Internal Revenue never gave notice of any assessment of the $74,648.39, and advised the petitioner as to just how the $74,648.39 had been calculated and determined, or granted the petitioner an opportunity to be heard or make protest against the assessment and collection thereof. But no question requiring the plaintiff to present such evidence was raised at the trial. If the District Court had not, at the very beginning of the trial, *ruled that the plaintiff had made out a prima facie case,* by reason of the Certificate of Overassessment and the admission of Counsel for the Government that the credits had been made after the statute had run (Rec. p. 16), the petitioner would have introduced competent evidence to establish all of these contentions beyond dispute.

It is respectfully submitted that, even though the claim for credit of $48,563.39 on April 10, 1923 was made after the statute of limitations had run, nevertheless the Commissioner was required under the applicable statutes, as well as a matter of equity, to give the *required notice* and grant the petitioner the right to be heard, before a credit or collection of $74,648.39 could be made.

> *Lipke* v. *Lederer*, 259 U. S. 557, 562; 42 S. Ct. 549, 551.
> *Turner* v. *Wade*, 254 U. S. 64; 41 S. Ct. 27.

In the case of *Lipke* v. *Lederer, supra*, this Court expressly holds that the constitutional guarantee of due process of law requires that, under a Federal Taxing Statute, the taxpayer must be given notice and an opportunity to be heard before the tax becomes irrevocably fixed and payable. Mr. Justice McReynolds, who delivered the opinion of the Court, said:

> "Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for a hearing; this is essential to due process of law. *Central of Ga. Ry.* v. *Wright*, 207 U. S. 127, 136, 138, 142; 28 Sup. Ct. 47; 52 L. Ed. 134; 12 Ann. Cas. 463."

The case of *Turner* v. *Wade, supra*, is to the same effect. In that case Mr. Justice Day, who delivered the opinion, said:

> ". . . due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute fixing the time and place of the hearing. See 210 U. S. 385, and previous cases in this court cited on page 386, 28 Sup. Ct. 708; 52 L. Ed. 1103. See also *Coe* v. *Fertilizer Co.*, 237 U. S. 413, 425; 35 Sup. Ct. 625; 59 L. Ed. 907."

As a matter of law, therefore, it is respectfully submitted that the claim for credit is not binding on the petitioner.

2. As a matter of equity the claim for credit of the $48,563.39 is ineffectual to create an estoppel.

It would be entirely unnecessary in this connection to cite the numerous cases in which this Court has expounded the doctrine of equitable estoppel in its various forms. "The doctrine of estoppel by conduct has been applied under a great variety of circumstances."

> *Leather Mf'rs' Nat. Bank* v. *Morgan*, 117 U. S. 96; 6 S. Ct. 657, 663.

In the above case Mr. Justice Harlan said:

> "These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth,—which he has the means, by ordinary diligence, of ascertaining,—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent; for, as observed by the Supreme Court of Ohio in *Ellis* v. *Ohio Life Ins. & T. Co.*, 4 Ohio St. 667, while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard for the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of iis rules and remedies to the enforcement of this duty. . . .'"

Applying the rule of equitable estoppel as thus expounded by Mr. Justice Harlan to the case at bar, it is respectfully submitted that the defendant in this case is precluded from asserting

the estoppel by reason of the fact that when the Commissioner accepted the claim for credit he must have known that no tax liability in regard to the 1915, 1916 and 1917 taxes existed at that time. Also, by reason of his failure to comply with the statute, give notice and the opportunity of a hearing before the supposed tax liability became "irrevocably" fixed.

In a case, not yet reported, decided by the United States Court of Claims on January 9, 1933, that Court held that the taxpayer was estopped from recovery of an overpayment credited to outlawed taxes because it had filed a claim for credit therefor.

> *Naumkeag Steam Cotton Co.* v. *United States*, Ct. Cls. No. L-327. (See Prentice-Hall Tax Service, 1933, Rep. No. 8, Par. 564; pp. 602–630.)

The above case, however, is clearly distinguishable from the case at bar. In that case the claim for credit was made before the period of limitation as to the outlawed years had expired and after the taxes had been assessed and demanded and the taxpayer had been given full opportunity to be heard in protest. The collector was, in that case, in a position to make the collection by distraint or otherwise. None of these circumstances exist in the case at bar.

In connection with the *Naumkeag Steam Cotton Co. case*, the attention of this Court is respectfully invited to a consideration of the able dissenting opinion rendered by Judge Littleton of the Court of Claims where the various regulations and rulings of the department in regard to claims for credit are referred to and commented upon. In the course of the dissenting opinion, Judge Littleton (Prentice-Hall, *supra*, pp. 617, 627) said:

> The long-continued practice of the department with respect to claims for credit should be taken into consideration. *Brewster* v. *Gage*, 280 U. S. 327, 336, 50 S. Ct. 115, 74 L. Ed. 457 (8 Am. Fed. Tax Rep. 10263). *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 51 S. Ct. 144 (9 Am. Fed. Tax Rep. 597).
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> . . . . . .
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> *In order to render the rule of estoppel operative it is essential that the party against whom the estoppel is claimed should have acted with knowledge of his rights and have*

been aware of the facts in respect of the estoppel claimed; also, that the party invoking the estoppel was misled by the acts of conduct of the party against whom the estoppel is claimed; that he changed his position in reliance thereon, and was justified in so doing; and that he was prejudiced thereby, or the party against whom the estoppel is claimed benefited. No estoppel arises where the positions taken are necessarily antagonistic or where the conduct relied on to create the estoppel was superinduced by the acts of the party invoking the doctrine. And in no event can the estoppel be extended beyond the natural and reasonable import of the acts or conduct relied on to create it. To sustain an estoppel in this case the defendant must affirmatively prove and point to facts to establish the above essential elements; if any are lacking, the defense fails. Estoppels are not favored by the law and will be disregarded unless clearly established. I am of the opinion that the facts in this case do not justify the application of the rule." (Italics supplied.)

In the case at bar, even if the petitioner had actually paid the $74,648.39 in cash on April 10, 1923, that would be a recoverable "overpayment" under Section 607 of the Act of 1928 (26 U. S. C. A. § 2607). We think that neither in equity, in fact, or in law could a taxpayer be in a weaker position by reason of a claim for credit filed after the statute of limitations had run than he would be if he had made an actual payment of the tax in cash after the statute had run.

It is respectfully submitted therefore that the petitioner is not precluded from recovery under the doctrine of equitable estoppel by reason of the fact that its claim for refund of the 1918 overpayment, filed on April 10, 1923, also contained a claim for credit of a portion of the overpayment to supposed taxes for the years 1915, 1916 and 1917.

III.

THE PETITIONER HAS A GOOD CAUSE OF ACTION AGAINST THE DEFENDANT MALLEY AND THE SUIT WAS PROPERLY AND SEASONABLY BROUGHT.

As explained in the petition for certiorari the petitioner now concedes that it has no cause of action against the defendant Nichols. The only theory upon which the defendant Nichols could have been liable under the circumstances would have been for his "act" in making the wrongful credits which Section 609 of the Revenue Act of 1928 (26 U. S. C. A. § 2609; p. 41, *infra*) expressly declares to be *"void"*. By the weight of authority the effect of this section now is that the wrongful credits did not constitute a payment of the 1915, 1916 and 1917 taxes and did not result in a suable act on the part of the defendant Nichols.

In the petition for certiorari (pp. 20-21) explanation has also been made, as to the reason why the plaintiff in this case did not base its cause of action on the Certificate of Overassessment in a suit in the Court of Claims (*Bonwit Teller & Co.* v. *United States*, 283 U. S. 258; 51 S. Ct. 395), as suggested in the opinion of the Circuit Court of Appeals (Rec. p. 68). It is obvious that in a suit against the United States, the Government could have relied upon the Commissioner's letter of December 17, 1929, or, in other words, could have contended that by that letter the Commissioner had rendered the Certificate of Overassessment *void;* instead of entirely disregarding that letter and contending that the Certificate of Overassessment is *valid*, in order to defeat the suit as here brought. In the light of all of the circumstances in the case at bar, therefore, the petitioner respectfully submits to this Honorable Court that its only reasonable and proper course of action was a suit against the Collector to whom the tax had been paid, relying upon the Commissioner's letter of December 17, 1929 as establishing the jurisdiction of the District Court, and that the suit was seasonably and properly brought against the defendant Malley for the following reasons:

1. The petitioner has a good cause of action against the defendant Malley for the recovery of the "overpayment of its 1918 taxes".

The petitioner respectfully submits that this suit was properly and seasonably brought against the defendant Malley within two years after the first and only disallowance of its timely claim for refund of the overpayment of its 1918 taxes, which was filed on April 10, 1923 in full compliance with Section 3226 of the United States Revised Statutes, as amended (41 Stat. 116; p. 41, *infra*). This statute provides:

> "No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, *unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.*" (Italics supplied.)

The tax in controversy was paid to the defendant Malley on or about September 17, 1919 (Rec. p. 54). The petitioner filed its claim for refund of the 1918 taxes on April 10, 1923, which was within four years of the date of payment as provided by Section 3228 of the Revised Statutes (45 Stat. 878; p. 42, *infra*). The claim was officially allowed on or about February 18, 1924, and was listed on the Schedule of Overassessments signed by the Commissioner of Internal Revenue on December 20, 1923 (Rec. p. 37). Thereafter the usual Certificate of Overassessment (Rec. p. 31) was issued to the petitioner on May 16, 1924 (Rec. p. 55). On January 31, 1924, the Collector of Internal Revenue prepared and signed the Schedule of Refunds and Credits whereon the $74,648.39 of the allowed overpayment for 1918 was credited and applied to the supposed deficiencies for the years 1915, 1916 and 1917 (Rec. p. 37). It is apparent that these credits were made more than five years from the dates upon which the returns for those years had been filed (Rec. p. 54), contrary to Section 250 (d) of the Revenue Act of 1921 (42 Stat. 264; p. 39, *infra*). On May 29, 1928, the Revenue Act of 1928

was enacted, Section 609 of which declares that any credits made after the period of limitation for the assessment and collection of taxes has expired are erroneous and "*void*" (p. 40, *infra*).

On July 27, 1929, the petitioner filed a claim on Form 843, for the refund of that portion of the 1918 overpayment ($74,648.39) which had been credited to the earlier years. With that claim it also filed a petition based solely on the contention that the credits were erroneous and void under Section 250 (d) of the Revenue Act of 1921, by virtue of Section 609 of the Act of 1928 (Rec. pp. 39–44). On December 17, 1929, the Commissioner of Internal Revenue, for the first time, refused to refund the $74,648.39. The ground of this refusal was not that the credits were valid and proper, but that there had been no overpayment of the 1918 taxes (Rec. p. 46). This letter of disallowance, states as follows:

> "The proper method for computing the income for the six months' period in question is in accordance with the original return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84 and Appeal of Coghlen Electric Company, 3 B. T. A. 1071 and Section 226 of the Revenue Act of 1918)."
>
> . . . . . .
>
> "It is accordingly held that the overassessment was erroneously allowed and, therefore, that portion of the overassessment which had not yet been refunded, having been credited against the tax liability for prior years, will not be refunded at this time. Your claim will be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner."

As further evidence that this action of the Commissioner of Internal Revenue on December 17, 1929, was in fact and in law a disallowance of the claim of April 10, 1923, the attention of the Court is invited to the very notes made in the Commissioner's office in 1929, which appear on the face of the same Certificate of Overassessment (Rec. p. 31) by which the claim of April 10, 1923 had originally been allowed. These notations are as follows:

> "$74,648.39 credited to barred taxes to be refunded Sec.

609 Act 1928 Memo to A & C 9/28/29 JJ This action cancelled by G. C. See memo dated 12/9/29. Refund not allowable JJ 2/24/30 attached."

It is thus obvious that the original administrative files were examined and that the Commissioner's letter of December 17, 1929 issued as a result of a reconsideration of the petitioner's claim of April 10, 1923.

Even if the Circuit Court of Appeals was right in holding that the letter of December 17, 1929 was a denial of the claim of July 27, 1929, that letter was still the first and only disallowance of that part of the claim of April 10, 1923 to which this suit relates as provided in Section 3226 of the United States Revised Statutes.

To reason from another point of view: The claim for refund of April 10, 1923 related to a sum of money ($107,826.61) which at that time occupied, on the books of the collector, the status of 1918 taxes. On the other hand, the claim for refund of July 27, 1929 related to a sum of money ($74,648.39) which was a portion of the original $107,826.61, but which in 1929 occupied the status of 1915, 1916 and 1917 taxes on the books of the collector.

From the standpoint of the respective accounts, therefore, as they stood at the time the claims were filed, the Commissioner's letter of December 17, 1929 was a disallowance of the right asserted in the claim of April 10, 1923, and never before denied, to a refund of 1918 taxes. If this reasoning is sound the letter of December 17, 1929 could not, either in fact or in law, be a disallowance of the claim of July 27, 1929.

It is respectfully submitted that the "*disallowance*" contemplated by the statute is not merely a rejection of a particular claim form or the physical claim itself, but that the statute contemplates a disallowance of the essence or the substance of the taxpayer's assertion of its right to the refund.

United States v. *Memphis Oil Company* (unreported) S. Ct. No. 308, October Term, 1932, decided January 9. 1933.

In the above case the asserted right to a refund seasonably made and a claim form filed out of time giving further specifications, were held "*not a double claim, but a claim single and*

indivisible". Mr. Justice Cardozo who delivered the opinion of the Court said:

> " The respondent filed a claim for taxes overpaid, a claim for money had and received to his use by the agents of the government.
>
> . . . . . .
>
> The function of the statute like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, *what is before him is not a double claim, but a claim single and indivisible, the new indissolubility welded into the structure of the old."* (Italics ours.)

Therefore, the Circuit Court of Appeals erred in refusing to hold that the letter of December 17, 1929 was, in its legal effect, a disallowance of the claim of April 10, 1923.

As to the time for suit: There is nothing in the law which sets a time limit within which the Commissioner of Internal Revenue must act on a timely claim for refund. If he does not act, of course, the taxpayer must bring his suit within five years of the date of payment. If, however, the Commissioner does actually disallow the claim, we think the statute permits the bringing of a suit within two years after the actual disallowance, whether or not such disallowance takes place before or after the expiration of the five year period.

United States v. *Michel*, 282 U. S. 656; 51 S. Ct. 284.

In the above case, Mr. Justice Butler, who delivered the opinion of the Court, quoted Section 3226 and said:

> " By this statute the United States waived its sovereign immunity from suit. The permission to sue is conditioned on the filing of a claim and the lapse of six months or the disallowance of the claim within that period, and is limited

to not more than five years after payment of the tax, unless the claim has been disallowed and the action is commenced within two years from the disallowance."

. . . . . .

"By the terms of the statute the period within which the Government consented to be sued commenced at the expiration of such six months and continued uninterruptedly through the five-year period following the date of payment *and until 'two years after the disallowance'.*" (Italics supplied.)

Under the language of the statute and the numerous interpretations thereof in cases decided by this Court, the petitioner respectfully submits that this suit was brought in time against the defendant Malley for the recovery of the overpayment of its 1918 taxes as alleged in Count I of the plaintiff's declaration (Rec. pp. 3–8).

2. The petitioner has a good cause of action against the defendant Malley for money had and received.

As a second form of action this suit was brought against the defendant Malley on the theory of money had and received, as alleged in Count II of the declaration (Rec. p. 8), of which the Certificate of Overassessment might or might not prove to be sufficient evidence. Since the defendant admitted in open court that the Certificate of Overassessment was a valid document and that the overpayment evidenced thereby had been credited to taxes for the earlier years after the statute had run, it is respectfully submitted that, upon this record, the petitioner fully sustained the burden of proving its right to recover under Count II of the declaration.

There is nothing in any statute or any decided case to the effect that a taxpayer is precluded from suing a Collector of Internal Revenue to whom either *the tax* or *the money* was actually paid, even though the Commissioner has issued a valid Certificate of Overassessment. Whether a Certificate of Overassessment has issued or not, the suit for money had and received is still a case arising "under a law providing for internal revenue" as provided in Section 629 of the United States Revised Statutes (p. 41, *infra*).

Downes v. *Bidwell*, 182 U. S. 244; 21 S. Ct. 770;
Klump v. *Thomas* (C. C. A. 7th), 162 Fed. 853, 856;
Bonwit Teller & Company v. *United States*, 283 U. S. 258; 51 S. Ct. 395;
Lewis et al. v. *Reynolds*, 284 U. S. 281; 52 S. Ct. 145.

Section 629 of the Revised Statutes (28 U. S. C. A. 41 (5)), as amended, provides:

> "The District Courts shall have original jurisdiction as follows:
>
> . . . . . .
>
> Fifth. Of all cases *arising under any law providing for Internal Revenue*, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals (R. S. § 563, par. 7, § 629, par. 4; Mar. 3, 1911, c. 231, § 24, par. 6, 36 Stat. 1092)." (Italics supplied.)

The case of *Downes* v. *Bidwell*, *supra*, holds that suit can be maintained, under the foregoing statute "against a collecting officer":

> "On account of any act done under color of his office, or of any such revenue law, or on account of any right, title, or authority claimed by such officer or other person under any such law."

While the *Bonwit Teller case*, *supra*, was brought against the United States and based upon the Certificate of Overassessment, there is nothing in that opinion to indicate that the same suit might not have been brought against the Collector for "money had and received" as *evidenced by* the Certificate of Overassessment.

There is nothing in any of the cases above cited which indicates that a collector may not be sued for money had and received, because the Commissioner has issued a Certificate of Overassessment evidencing the overpayment. Among the cases which present some slight indication that such a suit might be limited to an action in the Court of Claims is the case of *United States* v. *Real Estate Savings Bank*, 104 U. S. 728, 734. In

that case, however, the circumstances were entirely different from those in the case at bar. That decision itself clearly implies that if the Certificate of Overassessment has been "impeached for fraud or mistake" a suit against the United States could not be maintained on the "account stated" theory. In that case the Commissioner had not impeached or repudiated the allowance as the Commissioner's letter of December 17, 1929 does in the case at bar.

In the *Lewis* v. *Reynolds case, supra*, which is a suit against a collector and one of the latest decisions of this Court on the question of whether or not a suit would lie against a collector for money had and received, the Court, after reviewing the statutes, held that if the taxpayer could show that he had overpaid his tax a cause of action would lie against the collector to whom such tax was paid. Mr. Justice McReynolds, who delivered the opinion in the case, quoted with approval the language of the Circuit Court of Appeals for the Tenth Circuit where the Court said:

> "The action to recover on a claim for refund is in the nature of an action for money had and received and it is encumbent upon the claimant to show that the United States has money which belongs to him."

The petitioner respectfully submits, therefore, that it has a good cause of action against the defendant Malley under Count II of its declaration for money had and received as well as under Count I for 1918 taxes wrongfully and erroneously collected.

3. The Government's objections (1) that the suit was not seasonably brought and (2) that the District Court did not have jursidiction are untenable.

The only substantial objections which the Government raises against the petitioner's recovery are (1) that the suit is barred by the statute of limitations and (2) that the District Court did not have jurisdiction.

(1) As to the Statutes of Limitations the petitioner respectfully submits the following:

The claim for refund of April 10, 1923 was filed within four years of the date of payment of the 1918 taxes, or, of the

$74,648.39 as "money had and received" (*United States* v. *Memphis Oil Company, supra*), as provided in Section 3228 of the United States Revised Statutes (p. 42, *infra*); was never disallowed until December 17, 1929; and the suit was brought by a writ dated January 25, 1930 or within two years of the disallowance of that part ($74,648.39) of the claim of April 10, 1923, to which this suit or proceeding relates, as provided in Section 3226 of the United States Revised Statutes (p. 41, *infra*).

The suit was actually brought on January 25, 1930, or within six years of the issuance of the Certificate of Overassessment to the petitioner on May 16, 1924 (*Bonwit Teller & Company, supra;* 28 U. S. C. A. 41 (20); Judicial Code, Section 24, amended) so that if the Certificate of Overassessment was in fact valid, as the Government admitted it to be at the trial (Rec. p. 16), the plaintiff had a good cause of action against the United States and could have brought its action in that form, if the Commissioner had not "impeached" the Certificate of Overassessment and his previous allowance of the claim of April 10, 1923, by his letter of December 17, 1929 (Rec. p. 50).

The suit is not barred in the sense that a refund or a recovery of the $74,648.39 in the instant case would be *erroneous*, under Section 608 of the Revenue Act of 1928 (26 U. S. C. A. § 2608), which provides as follows:

> "Sec. 608. *Effect of Expiration of Period of Limitation Against Taxpayer.*
>
> A refund of any portion of an internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—
>
> . . . . . .
>
> (b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—
>
> (1) within such period suit was begun by the taxpayer, or . . . "

It was the obvious purpose and intent of Congress by the provisions of Section 607 and Section 609 (p. 40, *infra*,) of the Revenue Act of 1928 to enlarge or extend the period of recovery

in cases of this kind where a cash payment or a collection by way of credit had been made after the period of limitations applicable thereto; otherwise it would have been entirely unnecessary for Congress to have provided therein that both sections shall be applicable whether the payment or the credit was made *"before or after the enactment of this Act"*. See comments:

House Report No. 2, 70th Congress, 1st Session, pp. 33-34.

Senate Report No. 960, 70th Congress, 1st Session, pp. 17-18.

It is respectfully submitted that the suit is not barred by any statute of limitations.

(2) As to the Jurisdictional objection of the Government:

The petitioner accepted the Commissioner's letter of December 17, 1929 in good faith for what it purports to be,—*a denial of the fact that the petitioner had made an overpayment of its 1918 taxes.* The petitioner was taken completely by surprise when the Government came into the District Court and admitted the fact of the overpayment and contended that the Certificate of Overassessment and the other documents were valid, and rested its defense solely on the ground that the District Court did not have jurisdiction.

Whether the case at bar be considered as based on a disallowed claim for refund, under Count I of the declaration, or as a common law action for money had and received, under Count II of the declaration, it is respectfully submitted that the District Court had jurisdiction.

In this connection the attention of this Honorable Court is again called to the fact that the suit was brought within six years after the Certificate of Overassessment had been issued to the petitioner. In other words, the contention of Government counsel that the suit was brought on *an allowed claim* was in itself an admission that in a suit in the Court of Claims as in the case of Bonwit Teller & Company, *supra*, the Government would have had no defense. This suit would have been grounded upon the Certificate of Overassessment if the Commissioner of Internal Revenue had not misled the petitioner into believing that he had *"impeached"* his previous allowance by the letter of December 17, 1929 (Rec. pp. 49–50).

In both Courts below the Government rested its jurisdictional objection upon the authority of *United States* v. *Savings Bank*, 104 U. S. 728, in which Mr. Chief Justice Waite said:

> "A rejected claim may be prosecuted against the collector, and an allowed claim, not paid, may be sued for in the Court of Claims. To say the least, the decision of the Commissioner on the appeal is sufficient to determine whether one form of remedy shall be resorted to by the claimant, or the other."

In the opinion in the Savings Bank case, Mr. Chief Justice Waite, after referring to the case of *United States* v. *Kaufman*, 96 U. S. 567, and Section 3228 of the United States Revised Statutes, also said:

> "And we held that the allowance of a claim by the Commissioner under this section, was equivalent to an account stated between private parties and binding on the United States, until in some appropriate form it was impeached for fraud or mistake, . . ."

It is obvious, therefore, that if the plaintiff had grounded its suit upon the previous allowance of the claim, as counsel below argued it should have done, then the Government would undoubtedly have reversed the grounds of its jurisdictional objection, cited the same case as authority and contended that the suit was improperly brought because the allowance of the claim had been "*impeached for mistake*" by the letter of December 17, 1929 (Rec. p. 50). As a matter of fact, the Circuit Court of Appeals actually held that the Commissioner redetermined the taxes in 1929 and found no overassessment, or, in other words, that the Commissioner had impeached his previous allowance. The opinion of the District Court on the other hand rests entirely on the fact that the Commissioner's letter of December 17, 1929 is not an impeachment of the previous allowance.

It has always been the spirit of this Honorable Court and other courts to disregard as far as possible an objection to the form of the remedy and to give greater weight to the substantial rights and equities involved.

Howbert v. *Penrose*, 38 Fed. 577, 581.
United States v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; 35 S. Ct. 499.

In the case of *Howbert* v. *Penrose*, 38 Fed. (2) 577, 581, the Circuit Court of Appeals for the Tenth Circuit, McDermott Circuit Judge, said:

> "The defendant concedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc. R. Co.* v. *United States*, 254 U. S. 141, 41 S. Ct. 55, 56, 65 L. Ed. 188), *the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is that substance should be given the right of way over form.*" (Italics supplied.)

In the case *United States* v. *Emery, Bird Thayer Realty Co.*, *supra*, the Government raised the jurisdictional question. Mr. Justice Holmes of this Court overruled the objection in the following language:

> "The objection to the jurisdiction pressed by the government is that the only remedy is a suit against the collector. As the United States has received and keeps the money, and would indemnify the collector if he had to pay (Rev. Stat. § 3220, Comp. Stat. 1913, § 5944), the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that 'all laws relating to the collection, remission and refund of internal revenue taxes, so far as applicable,' etc., are extended to this tax (§ 38, 36 Stat. at L. 117, chap. 6), but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the collector for an unjustified collection was given by the common law. The jurisdiction over suits against the United States under § 24 of the Judicial Code extends to 'all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress.' However gradually the

result may have been approached in the earlier cases it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, § 24, first) and those 'founded upon' (id. § 24, twentieth) a law of the United States rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye. *Dooley* v. *United States*, 182 U. S. 222, 228, . . .

. . . . . .

Being of opinion that the district court had jurisdiction, we pass to the merits."

CONCLUSION.

The petitioner respectfully submits to this Honorable Court:

I. That upon this record the plaintiff fully sustained the burden of proving that it actually made an overpayment of its taxes for the six months period ended June 30, 1918.

II. That the plaintiff is not precluded from recovery by reason of the fact that its claim for refund of April 10, 1923 requested that a portion of the asserted overpayment should be credited to taxes for the years 1915, 1916 and 1917.

III. That the plaintiff, petitioner herein, has a good cause of action against the defendant Malley, and the suit was properly and seasonably brought.

IV. That the decision of the Circuit Court of Appeals is erroneous, should be reversed, and that judgment should be ordered for the plaintiff in the amount of $74,648.39 together with interest.

Respectfully submitted,

O. WALKER TAYLOR,
Attorney for Petitioner.

APPENDIX.

STATUTES INVOLVED.

Revenue Act of 1918:

Section 212 (b); 40 Stat. p. 1064:

"(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226."

Section 205 (a) 40 Stat. p. 1061:

"Section 205 (a). That if a taxpayer makes return for a fiscal year beginning in 1917, and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title 1 of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title 1 of the Revenue Act of 1917, which the portion of said period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period

computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period. . . ."

Section 226, 40 Stat. p. 1075:

"Sec. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year he shall make a separate return for the period between the beginning of the calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the credits provided in subdivision (c) and (d) of section 216 shall be reduced respectively to amounts which bear the same ratio to the full credits provided in such subdivisions as the number of months in such period bears to twelve months."

Revenue Act of 1921:

Section 250 (d), 42 Stat. p. 265:

"(d) The amount of income, excess-profits, or war profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four

years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed. . . ."

Section 1313, 42 Stat. p. 313:

"Administrative Review."

"Sec. 1313. That in absence of fraud or mistate in mathematical calculation, the findings of fact in and the decision of the Commissioner upon (or in case the Secretary is authorized to approve the same, then after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by any other administrative officer, employee, or agent of the United States."

Revenue Act of 1928:

Section 607; 26 U. S. C. A. § 2607:

"Sec. 607. Effect of expiration of period of limitation against United States: Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 609; 26 U. S. C. A. § 2609:

"Sec. 609. *Erroneous Credits.*

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act."

United States Revised Statutes:

Section 629; 28 U. S. C. A. 41 (5):

"The District Courts shall have original jurisdiction as follows:

. . . . . .

Fifth. Of all cases *arising under any law providing for Internal Revenue*, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (R. S. § 563, par. 5, § 629, par. 4; Mar. 3, 1911, c. 231, § 24, par. 5, 36 Stat. 1092.)" (Italics supplied.)

Section 3226, as amended; 26 U. S. C. A. 156:

"Section 3226 as amended; U. S. Code, Title 26, Section 156:

"156. *Suits for Recovery of taxes wrongfully collected.* No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal

Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

" (b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924."

Section 3228, as amended; 26 U. S. C. A. 157:

" Section 3228 as amended:

"157. *Claims for refundments; limitations.* (a) All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided by law in the case of income, war-profits, excess-profits, estate and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum."

" (b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed."

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APR 6 1933
CHARLES ELMORE CROPL
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 537.

ARTHUR C. HARVEY COMPANY,
Petitioner,

v.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS,
Former Collectors,
Respondents.

PETITIONER'S MOTION TO MODIFY JUDGMENT

AND

BRIEF IN SUPPORT OF MOTION.

O. WALKER TAYLOR,
Attorney for the Petitioner.

L. H. Lane, Law Printer, 221 High Street, Boston.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 537.

ARTHUR C. HARVEY COMPANY, PETITIONER,

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS, RESPONDENTS.

PETITIONER'S MOTION TO MODIFY JUDGMENT.

Comes now Arthur C. Harvey Company, petitioner in the above entitled case, by O. Walker Taylor, its undersigned attorney, and respectfully and most earnestly moves this Honorable Court, in the alternative:

First: To re-examine the record and consider whether this case be not one in which it would be just and proper for this Court to modify its judgment herein by remanding the case to the District Court for a new trial or a rehearing; or

Second: To modify or amend this Court's judgment and mandate herein so as to provide that the affirmance of the judgment below is without prejudice to further proceedings in the District Court, in the form of (1) a motion for a new trial, (2) a motion for a rehearing, (3) a bill of review or (4) such other proceedings as may seem just and proper in the premises; or

Third: To grant unto the petitioner such other and further relief as to this Honorable Court may seem meet and equitable; and

Fourth: To stay the issuance of this Court's mandate herein pending the disposition of this motion.

GROUNDS FOR THE ALLOWANCE OF THE MOTION.

As grounds for the allowance of its motion the petitioner respectfully requests this Honorable Court to consider the following facts:

1. That the petitioner, by a combination of unfortunate circumstances which its counsel could not possibly anticipate, prevent or remedy, (1) has never been granted the opportunity of a full and fair trial, and (2) has been denied the right of appeal from an obviously erroneous decision of the District Court.

2. That in "so far as any rulings of law were made 'in the course of the trial', with one exception" (which was unimportant), "they were in favor of the plaintiff" and in the nature of things could not be excepted to, and made the basis of assignments of error on appeal. (See Rec. p. 24.)

3. That the District Court completely departed from all of its findings and rulings made "in the course of the trial" and decided the case "on a question which was not discussed at the hearing or noticed in the briefs" during "the course of the trial". (See Rec. p. 82.)

4. That the plaintiff was ready, able and in fact, offered to present its case in the usual, regular and orderly manner but was precluded from doing so by the admonition of the District Judge and the favorable rulings made "in the course of the trial". (See Rec. pp. 80–81.)

5. That the judgment of the District Court and the rulings contained in its written opinion (Rec. pp. 56–59) are clearly shown to be *erroneous in law* and *in direct conflict* (1) with a subsequent decision of the United States Court of Claims in which certiorari was not applied for and (2) with a decision of the Circuit Court of Appeals for the Sixth Circuit in which this Court denied a writ of certiorari.

> *Parks & Woolson Machine Company* v. *United States* (Ct. Cl.), 58 Fed. (2) 868;
>
> *Routzahn* v. *Reeves Brothers Co.*, 59 Fed. (2) 915 (C. C. A. Sixth; certiorari denied 53 S. Ct. 97).

6. That all of the findings and rulings of the District Court "in

the course of the trial" *were sound in law* and *in direct accord with* the above cited decision of the United States Court of Claims and that of the Circuit Court of Appeals for the Sixth Circuit.

7. That the published and approved rules of the District Court of Massachusetts and the uniform and long established practice of that Court and attorneys in pursuance thereof, permit a losing party to save his exceptions in a bill of exceptions, seasonably filed and approved by the Court, to any rulings of the Court made "in the absence of counsel or in writing", or, in other words, to rulings not made "in the course of the trial". (See p. 10, *infra*.)

8. That the published and approved rules of the Circuit Court of Appeals for the First Circuit do not make it mandatory that each and every error of law must be assigned but provide that "the court at its option may notice a plain error not assigned or specified". (See pp. 11–12, *infra*.)

9. That all of the holdings and rulings of the Circuit Court of Appeals on the merits of the case (Rec. pp. 63–70 and 85–87), which the opinion of this Court does not approve, are clearly erroneous as shown (1) by a previous decision of this Court in another leading case and (2) by two leading decisions of the United States Board of Tax Appeals.

American Hide & Leather Co. v. *United States*, 284 U. S. 343; 52 S. Ct. 154;
Appeal of Henry D. Weed, 2 B. T. A. 84;
Appeal of Coghlin Electric Co., 3 B. T. A. 1071.

10. That the case is an exceptional one involving important questions of statutory construction and appellate procedure which the opinions of the Courts below have left unsettled and in great confusion, by reason of the peculiar circumstances surrounding the case, as more fully explained in the brief in support hereof.

11. That unless relief as requested in the motion is granted, the petitioner shall have been denied a fair trial, or its day in

court, notwithstanding its honest efforts to obtain the same at great expense and inconvenience.

O. WALKER TAYLOR,
Attorney for Petitioner.

AFFIDAVIT OF COUNSEL.

COMMONWEALTH OF MASSACHUSETTS.
SUFFOLK, SS. BOSTON, MASSACHUSETTS, March 30, 1933.

Then personally appeared the above-named O. Walker Taylor, attorney at law, of Boston, Massachusetts, member of the bar of the Supreme Court of the United States, and being duly sworn deposed and said that he prepared and signed the foregoing "Motion to Modify Judgment"; that the same was prepared at the suggestion of, and with the full knowledge, consent and approval of Arthur C. Harvey Company, a corporation with a usual place of business at Boston, Massachusetts; that the facts stated as grounds for the allowance and in the brief in support of the said motion are true to the best of his knowledge and belief; that there are good, sufficient and just grounds for the allowance of the relief sought by the said motion and that the same is not filed for the purpose of delay; and that due notice of the filing of said motion has been given the Solicitor General of the United States together with three copies of said motion and brief in support thereof. Before me,

FRANK J. LINEHAN, JR.,
Notary Public.

My commission expires October 22, 1937.

BRIEF IN SUPPORT OF MOTION.

In support of the foregoing motion the petitioner respectfully submits the following:

JURISDICTION.

The jurisdiction of this Court, to grant the relief sought by the motion, is well established by precedent and the petitioner believes it has always been the policy of this Honorable Court to grant such relief in exceptional cases, where the interest of justice may require.

Missouri Pacific Railroad Company v. *Norwood*, 283 U. S. 249; 51 S. Ct. 458;
The Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643; 51 S. Ct. 587;
Insurance Company v. *Tweed*, 7 Wall. 44; 74 U. S. 65;
Flanders v. *Tweed*, 9 Wall. 425; 76 U. S. 68.
Central Surety and Ins. Co. v. *Davidson*, 46 Fed. (2) 774.

In all of the foregoing cases this Honorable Court granted some such relief, as is sought by this motion, under circumstances which, your petitioner respectfully submits, were less meritorious than the unusual circumstances presented in the case at bar. The petitioner believes, therefore, that this motion for relief is properly presented in this Court.

In the event, however, that the motion is not properly made here, or should be denied, the petitioner respectfully prays that this Honorable Court will indicate whether or not the petitioner may apply for similar relief either (1) in the District Court or (2) in the Circuit Court of Appeals, as the Court did indicate in its memoranda in the case of *Missouri Pacific Railroad Company* v. *Norwood*, 283 U. S. 809; 51 S. Ct. 652, and in that of *The Federal Trade Commission* v. *Raladam Company*, 284 U. S. 623; 52 S. Ct. 14.

ARGUMENT.

I.

ANY FAILURE OF THE PETITIONER PROPERLY TO PERFECT ITS APPEAL IN ACCORDANCE WITH SECTIONS 649 AND 700 OF THE UNITED STATES REVISED STATUTES RESULTED FROM AN UNFORTUNATE CONDITION WHICH THE PETITIONER COULD NOT REMEDY OR AVOID.

In support of this contention, the attention of this Honorable Court is called to the comments in the opinion of the Circuit Court of Appeals (Rec. p. 64), which are as follows:

> "So far as any rulings of law were made 'in the course of the trial', with one exception they were in favor of the plaintiff,' . . ."

The attention of this Honorable Court is also respectfully invited to the statements of counsel and the rulings of the District Court (Rec. pp. 80-81) which were made "in the course of the trial":

> "Mr. TAYLOR (For plaintiff). The only question and what I am trying to avoid is the attempt in this suit of counsel for the Government to repudiate that original determination and certificate of overassessment by the Commissioner, which is just what they attempted to do in the letter in which they denied our claim, and that is why I was trying to go into all that, your Honor. *I think they are going to raise the question as to which return was proper, and we are prepared and we want to put in evidence on that.*"
>
> "The COURT. Well, you sue because these allocations for past years were made after the statute had run. That is your suit, is it not?
>
> Mr. TAYLOR (For plaintiff). Yes.
>
> The COURT (To counsel for defendants). What do you say to that? In other words, if the certificate of overassessment, whatever it is, is valid—I understand you to say it is not valid but if it is valid—then it was too late after that to use this extra money in paying the former deficiencies. Do you admit that?

Mr. CLARK (For defendants). Yes, your Honor.

The COURT. All right.

Mr. CLARK (For defendants). The first thing that we are confronted with—

The Court. All right; I rule that Mr. Taylor has made out a prima facie case. I will hear you.

Mr. CLARK (For defendants). Would it be of any assistance if your Honor were to be informed briefly of the nature of our defense so that you might follow the case as it proceeds?

The COURT. Are you talking about 'briefly'? Considering this case has taken about 8 years, I assume it will not be brief. I will hear your defense now, briefly, or longly or in any way you want. You admit that, if the certificate of overassessment is valid, then the statute of limitations had run?

Mr. CLARK (For defendants). For collection.

The COURT. I understood you to say so.

Mr. CLARK (For defendants). That is right.

The Court. Then I rule that the allocation of part of this money which the Government had to the payment of past deficiency was wrong, and therefore Mr. Taylor has made out a prima facie case, and I will hear you for the defense.

Mr. TAYLOR (For plaintiff). Your Honor—

The COURT. I would not advise you to speak. I may change my mind as to you. 'Silence is golden', Mr. Taylor, proceed, sir.

Mr. CLARK (For defendants). I would proceed a little informally because we do not want to build too big a record on the part of the defendant.

The Court. Most court proceedings, in my judgment, when they become too formal are absolute rot. I try to get down to the issue as quickly and as far as I can. Now I will hear you." (To Mr. Clark, for defendants.)

No other rulings or findings of any consequence, except as indicated by the above colloquy, were actually made by the District Court "in the course of the trial". Thereupon, pursuant to the direction of the Court, Mr. Clark, for the defense,

offered in evidence the Certificate of Overassessment (Rec. p. 31) and the defendants' other exhibits.

The argument of the defense "in the course of the trial" was limited entirely to a discussion of jurisdiction, a question which the District Court did not rule upon, counsel for the defendant contending that the suit was based on "an allowed claim", as indicated by the Certificate of Overassessment, and should have been brought in the Court of Claims; while counsel for the plaintiff argued that the suit was properly brought against the Collector because the Commissioner of Internal Revenue had "impeached" the Certificate of Overassessment and rejected the claim for refund by his letter of December 17, 1929 (Rec. pp. 49–50).

Naturally, counsel for the plaintiff did not take or save exceptions, "in the course of the trial", to any of the District Court's rulings, because they were all in favor of the plaintiff. Nor was objection or exception made or saved to any of the documentary evidence of the defense because that was in favor of the plaintiff and proves conclusively (1) that the petitioner actually overpaid its 1918 taxes and (2) that $74,648.39 of the overpayment was credited and applied to alleged deficiencies for 1915, 1916 and 1917 which were barred by the statute of limitations.

Moreover, the above colloquy shows clearly that counsel for the petitioner was not content to rest its case at that point even though the Court had ruled (1) that the credits were "*wrong*" and (2) that the plaintiff had "*made out a prima facie case*" but was admonished by the Court "not to speak". Counsel for the petitioner accepted, at their face value, the rulings and admonition of the Court thus made "in the course of the trial", and relying thereon presented the plaintiff's sixth request for a ruling (Rec. p. 52), which might, as the Court's rulings seemed to indicate, be interpreted as embracing the gist of the plaintiff's whole case on the merits, to wit:

> "6. That upon all the law of the case the application and credit by the Commissioner of Internal Revenue and/or the defendants of the sum of $74,648.39 to the alleged underpayments of the plaintiff's income taxes for the years

1915, 1916 and 1917 constituted an overpayment which should be refunded to the plaintiff as provided in Sections 607 and 609 of the Revenue Act of 1928."

But the District Court did not adhere to any of its rulings thus made "in the course of the trial" or to the theory of the case as alleged in the pleadings and presented in the arguments at the trial on August 6, 1931.

In a letter dated September 8, 1931 (Rec. p. 82) the Court advised counsel for the petitioner as follows:

> "As the matter stands in my mind now I shall decide the case on a question which was not discussed at the hearing or noticed in the briefs."

The question thus referred to in the letter was as follows:

> "Whether the credit in the Harvey case is not void because under Sections 607 and 609 a refund could not be had for the taxes of the years 1915, 1916 and 1917, as no claim for refund of those taxes had ever been filed."

In its opinion (Rec. p. 59) the District Court holds:

> "In the case before the court no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 or 1917. As no refund could be made, the credit is not void.
>
> Judgment for the defendants."

The plaintiff could not in reason and justice be expected to take and save exceptions "in the course of the trial" to rulings so clearly in its favor. Courtesy and respect demanded that counsel for the plaintiff heed the Court's admonition that "*silence is golden*". Under the circumstances the petitioner's only recourse was to base its bill of exceptions and assignments of error upon the rulings and finding as embodied in the District Court's written opinion even though they had no connection whatever with any matter which had been argued or commented upon "in the course of the trial".

Moreover, this course of procedure, even if the District Court had adhered to its rulings "in the course of the trial", is in accordance with the long continued practice in the District

Court of Massachusetts and in the Circuit Court of Appeals for the First Circuit and is clearly permissible under the printed rules of both courts. Litigants in the District Court of Massachusetts have uniformly and over a long period of time been permitted to save their rights, in a bill of exceptions and appeal from any ruling or finding made by the Court "in the absence of counsel or in a written opinion", and to base their assignments of error thereon.

1. The pertinent rules of the District Court are as follows:

Rule 20. "Exceptions—When to Be Claimed.

No exception shall be allowed to any oral order, ruling, or decision made in the presence of counsel, unless it be saved at the time such order, ruling or decision is made. Any exception to a charge to the jury must be claimed before the jury is sent out. *Exceptions to orders, rulings and decisions made in the absence of counsel, or in writing, may be claimed and saved in a bill of exceptions filed as hereinafter provided.*" (Italics supplied.)

Rule 21. "Same—Bill of Exceptions.

Bills of exceptions to any order, ruling, or decision of the court shall be filed, and notice in writing thereof given to the adverse party within twenty days after the order, ruling or decision is made, or in case of rulings made during a trial or hearing on the merits within twenty days after the verdict of the jury or finding by the court, unless the court or judge shall otherwise order; and it or he may for good reason allow a period therefor beyond the term or after judgment. . . ."

Rule 22. "Bill of Exceptions—Allowance Before Appeal.

In actions at law, civil or criminal, rulings of the court on matters other than the pleadings cannot be reviewed on appeal, unless set forth in a bill of exceptions, filed and allowed before the allowance of the appeal."

2. The pertinent rules of the Circuit Court of Appeals are as follows:

Rule 10. "Bills of Exception—Charge to Jury—Omission of Unnecessary Evidence.

The judges of the district courts in allowing bills of exception shall give effect to the following rules:

1. No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions.

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

Rule 11. "Assignment of Errors.

The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of errors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned

according to this rule will be disregarded, *but the court, at its option, may notice a plain error not assigned.* See Rule 24, section 4." (Italics supplied.)

Rule 24, Section 4.

"4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard except at the request of the court; and errors not specified according to this rule will be disregarded; *but the court, at its option, may notice a plain error not assigned or specified.* See Rule 11." (Italics supplied.)

As to the matter of requests for findings of fact and rulings of law in the District Court of Massachusetts, a District Judge, sitting without a jury, seldom, if ever, actually grants or denies such requests "in the course of the trial". The requests are usually taken under advisement by the Court and are allowed or denied either (1) in the Court's written opinion or (2) in a written memorandum filed in the office of the Clerk of the Court at the time the opinion is filed. In view of this practice the parties do not take and save exceptions to the failure of the Court to pass upon written requests "in course of the trial". It is the uniform practice to save such exceptions in a bill of exceptions allowed by the Court. The petitioner respectfully submits, therefore, that in the matter of its bill of exceptions and assignment of errors everything was done to save its rights on appeal that its counsel could humanly and reasonably be expected to do, under all of the circumstances.

Despite the rules and the long continued practice in the District Court of Massachusetts, and notwithstanding the fact that no reference whatever was made to the petitioner's failure to comply with Sections 649 and 700 of the United States Revised Statutes, either in the briefs or in the oral arguments in the Circuit Court of Appeals, that Court (Rec. p. 64) commented as follows:

"It is doubtful, therefore, whether under Sections 649 and 700 R. S. any question of law is raised on the record for the consideration of this court by the appellant's assignments of error. The findings of fact are general, and no rulings of the court were excepted to 'during the course

of the trial,' which are relied on. Exceptions, following an order of judgment, to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, are not rulings in the course of the trial. *Fleischmann Cons. Co.* v. *United States,* 270 U. S. 349; *United States* v. *Smith,* 39 Fed. (2) 851; *Wilson* v. *Merchants' Loan & Trust Co.,* 183 U. S. 121."

Neither the *Fleischmann Cons. Co. Case,* nor any of the other cases referred to in the foregoing comments, presented such unusual circumstances as exist in the case at bar. In so far as the records in these cases reveal, the Lower Courts strictly adhered to the findings and rulings made "in the course of the trial" and counsel for the parties in those cases were not misled by the established practice and rules of the Courts and by the rulings made by the District Courts "in the course of the trial".

It is fundamental that the right of a litigant to a fair trial in the lower Court carries with it, by necessary implication, the right to his day in the Appellate Court. True, he may forfeit his right to appeal by negligence or failure to save necessary exceptions in the trial Court. The petitioner respectfully submits, however, that there is no evidence in the instant case of any such negligence. If due weight be given to the long continued practice by attorneys appearing before the District Court of Massachusetts and to Rules established by that Court, which we have quoted above, the conclusion is inescapable that the petitioner's rights were saved in respect of the erroneous ruling and conclusion of the District Judge.

It is only by ignoring the rules and the long continued practice in the District Court of Massachusetts that it can be said that the petitioner is bound by any failure properly to save its exceptions "in the course of the trial". If these rules are to be ignored or nullified and the established practice in the District Court of Massachusetts is to be disregarded, then, and then only, may it be said that the petitioner, appellant below, failed properly to take exceptions and assign errors. If the petitioner has failed in this respect the failure is due to the fact that two clear rules of the District Court have proven to

be ineffectual and the ineffectuality of the established rules of the Court itself has rendered the petitioner without remedy in respect of the erroneous rulings of the District Court and its failure to find the facts of the case as it was seasonably requested to do.

It must, therefore, be obvious that justice has been denied the petitioner unless relief can be given it by this Honorable Court or by the District Court either on a rehearing here or on a new trial in the District Court. The reason for these conclusions, as was clearly pointed out in the opinion of the Circuit Court of Appeals (Rec. p. 64) is that "during the course of the trial" the District Court consistently ruled in favor of the petitioner but after the trial "in absence of counsel" in its written opinion or decision, repudiated all of the rulings which it had made "in the course of the trial".

In applying for a writ of certiorari to this Honorable Court the petitioner was confronted with the same kind of dilemma. While the Circuit Court of Appeals stated that "it was doubtful" whether any question of law was properly before it, that Court, nevertheless, proceeded in its opinion to state all of the essential facts of the case and to pass upon and decide the case on the merits, but on an entirely different theory from that upon which the decision of the District Court rests and on matters of law and of fact which were not urged by counsel in oral arguments or in the briefs. Thus, in the petitioner's brief and oral argument before this Honorable Court counsel for the petitioner believed that any technical failure to comply with Sections 649 and 700 of the United States Revised Statutes would be disregarded and that this Honorable Court would consider the case on its merits since the Circuit Court of Appeals had done so.

The petitioner most respectfully submits, therefore, that justice has been denied the petitioner unless relief be given it in this Honorable Court, or in the District Court, either on rehearing here or by a new trial in the District Court which may be had either under the mandate of this Court ordering such new trial or under leave granted by this Honorable Court to apply for such relief either to the District Court or to the Circuit Court of Appeals, as this Court may direct.

II.

THE DECISION OF THE DISTRICT COURT IS CLEARLY SHOWN TO BE ERRONEOUS BY SUBSEQUENT DECISIONS OF THIS AND OTHER COURTS.

In its ultimate analysis the case at bar involves the interpretation of the meaning and effect of Sections 607 and 609 of the Revenue Act of 1928, 45 Stat. 874; 26 U. S. C. A. 2607 and 2609. The interpretation put upon these sections in the opinion of the District Court (Rec. pp. 56–59) is clearly shown to be erroneous by subsequent decisions of the Court of Claims and by a decision of the Circuit Court of Appeals for the Sixth Circuit in which this Court refused to grant a writ of certiorari.

Parks & Woolson Machine Company v. *United States* (Ct. Cl) 58 Fed. (2) 868;

Routzahn, Collector, v. *Reeves Bros. Co.*, 59 Fed. (2) 915 (C. C. A. 6th); certiorari denied 53 S. Ct. 97).

All of the rulings of law which the District Court actually made "in the course of the trial" were directly in accordance with the holdings of the Circuit Court of Appeals for the Sixth Circuit and that of the Court of Claims in the two cases cited above, while all of the comments and holdings in the District Court's "written opinion" are directly in conflict with those decisions. In the course of the trial, the District Court ruled and found (Rec. p. 81), that the credit of the $74,648.39 to alleged taxes for the outlawed years was "wrong", or in other words, that the credits were void under Sections 607 and 609 of the Revenue Act of 1928, *supra*. At the trial, counsel for the petitioner believed this finding and ruling of the District Court to be sound in law and of course did not save an exception to the ruling but trusted that in rendering its judgment the District Court would adhere to its own ruling thus so clearly made "in the course of the trial". In its written opinion, however, the District Court completely reverses its previous ruling and holds that the credits were "not wrong" but "valid", under Sections 607 and 609 of the Revenue Act of 1928, *supra*.

III.

THE COMMENTS AND HOLDINGS OF THE CIRCUIT COURT OF APPEALS ON THE MERITS OF THE CASE, WHILE NOT APPROVED BY THIS HONORABLE COURT, ARE CLEARLY ERRONEOUS AND IN CONFLICT, IN EVERY VITAL RESPECT, WITH APPLICABLE DECISIONS OF THIS COURT AND OF THE BOARD OF TAX APPEALS.

While this Court in its opinion did not approve the comments on the merits of the case made in the opinion of the Circuit Court of Appeals, the petitioner begs to assure this Honorable Court that it would not here seek further relief if the opinion of the Circuit Court of Appeals on the merits of the case was sound in law and in agreement with the applicable decisions of this and other Courts.

On the question of whether or not the petitioner's taxes for the six months' period ended June 30, 1918, should be computed under Section 205 (a) of the Revenue Act of 1918, as alleged in the plaintiff's declaration (Rec. pp. 4–5), or under Section 226 of that Act as alleged in the Commissioner's letter of December 17, 1929 (Rec. p. 50), the opinion of the Circuit Court of Appeals denying the petitioner's motion for reconsideration (Rec. p. 86) contains the following comments:

> "Under Sec. 205 the tax for the entire fiscal year beginning in 1917 and ending in 1918, and computed in accordance with that section, was apportioned according to the part of the fiscal year falling within each of the calendar years.
>
> Counsel contends, apparently basing his contention on some language in the opinion in *American Hide & Leather Company* v. *United States*, 284 U. S. 343, 351, that the gross income and deductions for the entire fiscal year of 1917–1918 should be apportioned to the part of the fiscal year falling in 1918, and the tax computed on the net income thus obtained for that period, which, of course, assuming the gross income and deductions are agreed to, would produce the same result as if computed under Sec. 205.
>
> But the question of how the tax should be computed

under Sec. 226 was not in issue in the American Hide & Leather Company case, and the language in the opinion on which counsel relies, being obviously dictum, should not control this court, since it is not only contrary to the language of the statute, but would produce inequitable results."

As pointed out in the petition for writ of certiorari in the instant case, the foregoing comments and the method of computation illustrated in the opinion of the Circuit Court of Appeals are clearly in conflict with a leading decision of this Honorable Court as well as with leading decisions of the United States Board of TaxAppeals.

American Hide & Leather Co. v. *United States,* 284 U. S. 343; 52 S. Ct. 154;
Appeal of Henry D. Weed, 2 B. T. A. 84;
Appeal of Coghlin Electric Co., 2 B. T. A. 1071.

The language of Mr. Justice Stone in the *American Hide & Leather Company case, supra,* thus referred to in the opinion of the Circuit Court of Appeals, is as follows:

"Section 226 of the 1918 act authorizes the calculation of the tax for that part of the fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed,* 2 B. T. A. 84."

The comments in the opinion of the Circuit Court of Appeals on the vital question of the sufficiency of the petitioner's claim for refund and its compliance with Section 3226 of the United States Revised Statutes are equally erroneous and in conflict with one of the most recent leading decisions of this Honorable Court.

United States v. *Memphis Cotton Oil Co., decided January 9, 1933.*

The opinion of the Circuit Court of Appeals (Rec. pp. 67-68) states as follows:

> "To avoid the objection that its suit, begun in 1930, was not brought within five years of the alleged overpayment, which was in 1919, the appellant asserts that the claim filed in 1929 was only a reassertion of its claim filed in 1923; and having filed a claim for a refund within four years of the payment of the tax, and since the claim filed in July, 1929, being a reassertion of its claim filed in 1923, was disallowed, and this action was brought within two years of the disallowance, the provisions of Section 3226 R. S. were complied with.
>
> . . . . . .
>
> But a claim for a refund barred by the statute cannot be revived by filing a new claim and basing an action on its denial."

In the case of the *Memphis Cotton Oil Co., supra*, Mr. Justice Cardozo in commenting upon the effect of a claim filed out of time which merely amplified or re-asserted, before rejection, a claim seasonably filed, held that the two claims were one and the same, in the following language:

> "The function of the statute like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits *what is before him is not a double claim but a claim single and indivisible, the new indissolubly welded into the structure of the old.*" (Italics supplied.)

In view of the fact that the decision of the District Court is so clearly shown to be erroneous and that this Court did not approve the comments of the Circuit Court of Appeals in regard to the merits of the case, the petitioner respectfully submits that it is justly entitled to a rehearing or a new trial in the District Court.

IV.

IT IS ENTIRELY CONSONANT WITH THE POLICY OF THIS HONORABLE COURT TO MODIFY ITS OWN JUDGMENTS AND GRANT A REHEARING OR A NEW TRIAL IN THE LOWER COURT WHERE THE INTERESTS OF FAIRNESS AND JUSTICE REQUIRE.

As authority (1) for this Court to modify its own judgment without prejudice so as to permit further proceedings in the District Court or (2) for this Court itself to remand the case to the District Court for a retrial even though the appeal to the Circuit Court of Appeals was not strictly in accordance with Sections 649 and 700 of the United States Revised Statutes, the petitioner relies upon the five cases cited above and other cases where this Court has granted such relief as is sought by the foregoing motion.

In the case of *Missouri Pacific Railroad Company* v. *Norwood*, 283 U. S. ; 51 S. Ct. 458, this Court entertained a motion to modify its judgment and in a memorandum (283 U. S. 809; 51 S. Ct. 652) said:

> "June 1, 1931. The judgment herein (283 U. S. 249, 51 S. Ct. 458, 75 L. Ed. 1010) is modified so that the judgment clause will appear in the mandate as follows:
>
> On consideration whereof, it is ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed with costs without prejudice to any application to the District Court to amend the pleadings or otherwise."

In the case of *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 51 S. Ct. 587, this Court in a memorandum (283 U. S. 809; 51 S. Ct. 652) said:

> "June 1, 1931. Leave granted to file motion to modify Judgment (283 U. S. 643, 51 S. Ct. 587, 75 L. Ed. 1324) within thirty days. Term extended and mandate stayed pending disposition of the motion by this court."

While the motion in that case was denied, this Court in a memorandum (284 U. S. 623; 52 S. Ct. 14) said:

"October 12, 1931. The motion to modify the judgment of this court in this case is denied without prejudice to application to the Circuit Court of Appeals for similar relief."

In the case of *Central Surety & Insurance Co.* v. *Davidson*, 46 Fed. (2) 774, the Circuit Court of Appeals for the Tenth Circuit overruled a motion to dismiss the appeal for failure to comply with Sections 649 and 700 of the United States Revised Statutes, reversed the decision of the District Court and remanded the case for a new trial. The opinion of the Court in that case states:

"Appellee has moved to dismiss this appeal on the ground there was no waiver of a jury in writing filed before the trial of the case; therefore there is nothing for review. It is true, there was, as shown by the record, no waiver of trial by jury actually filed at the time of the trial. But clearly there must have been an agreement between counsel at the time of the trial, a jury to try the case had been waived and counsel had simply neglected to prepare and file the same of record. If not so, why, after the trial, should counsel for plaintiff have signed such a waiver and stipulated it should be filed and effective as of the day of the trial? After this was done, it would be manifestly unjust to treat the act as entirely meaningless. *Such action would not tend to promote the doing of justice in our courts. Situations somewhat akin to that which we have here are ruled in Dundee Mortgage Co.* v. *Hughes*, 124 U. S. 157, 8 S. Ct. 377, 31 L. Ed. 357, *and in Flanders* v. *Tweed*, 9 Wall. 425, 19 L. Ed. 678. *We are of the opinion the motion to dismiss this appeal on this ground should be, and is, denied.*"

. . . . . .

"*For the reasons above indicated, the judgment should be reversed, and the case remanded to the trial court for a new trial.*

It is so ordered." (Italics supplied.)

In the case of *Insurance Company* v. *Tweed*, 7 Wall. 44; 74 U. S. 665, Mr. Justice Miller pointed out the condition of the record and granted a new trial in the following language:

"The action in the case before us was brought in the Circuit Court for the Eastern District of Louisiana, on a policy of insurance, and was tried by the court without a jury. There is no bill of exceptions. There is no ruling on any proposition of law raised by the pleadings. The evidence seems to be copied into the transcript, but whether it is all the testimony, or how it came to be here, there is nothing to show. There is, in fact, nothing which a writ of error can bring here for review, tested by the rules of of the common law.

. . . . . .

We are asked in the present case to accept the opinion of the court below as a sufficient finding of the facts within the statute, and within the general rule on this subject. But with no aid outside the record we cannot do this. The opinion only recites some parts of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts as found from that evidence. Besides it does not profess to be a statement of facts, but is very correctly called in the transcript, 'reasons for judgment.'

But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; and inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made.

Upon an examination of the facts thus stated, and placing upon them that construction most favorable to the judgment of the court, we are of the opinion that it cannot be sustained.

. . . . . .

Without commenting further, we are clearly of opinion that the explosion was the cause of the fire in this case, within the meaning of the policy, and that the judgment of the Circuit Court must be reversed, and a new trial granted."

In the other case, cited above, *Flanders* v. *Tweed*, 9 Wall. 425; 76 U. S. 68, Mr. Justice Nelson, who delivered the opinion of this Court, said :

"There having been no stipulation, nor any finding of the facts, in this case, and no question upon the pleadings, *it would follow*, according to the general course of proceeding in like cases, heretofore in this court, *that the judgment, below should be affirmed. There are, however, cases which under very special circumstances the courts have made an exception, and have* simply dismissed the writ of error, as in the case of *Burr* v. *Des Moines Co.*, 1 Wall. 99, 17 L. Ed. 561, or have reversed the judgment below for a mistrial, and *remanded it for a new trial*, as in the case of *Graham* v. *Bayne*, 18 How. 60, 15 L. ed. 265. See, also, *Guild* v. *Frontin*, Ib. 135, 15 L. ed. 290. *In the present case it is apparent the parties below supposed that they had made up a case, according to the practice in Louisiana*, from the finding of the facts by the court, that would entitle them to a re-examination of it here; but as the court did not make it up, and file it, as of the date of the trial and judgment, it cannot be regarded as a part of the record and, under the circumstances, the case being an important one, and intended to be carried up here for re-examination, we shall reverse the judgment for a mistrial *and remand it to the court below for a new trial.*" (Italics supplied.)

CONCLUSION.

The petitioner respectfully submits that in the case at bar (1) it is apparent that the District Court and the parties below "supposed that they had made up a case" on appeal according to the established rules and practice in the District Court of Massachusetts and (2) that "under the circumstances, the case being an important one", this Honorable Court should grant the petitioner a new trial, or should give its permission for the petitioner to apply for similar relief either in the Circuit Court of Appeals or in the District Court as this Honorable Court may direct.

Respectfully submitted,

O. WALKER TAYLOR,

Attorney for the Petitioner

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No. 537

In the Court of Claims of the United States

OCTOBER TERM, 1932

ARTHUR C. HARVEY COMPANY, PETITIONER

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 537

ARTHUR C. HARVEY COMPANY, PETITIONER

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, Former Collectors of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts (R. 56–59) is reported in 52 F. (2d) 885. The opinion of the Circuit Court of Appeals for the First Circuit (R. 63–70) is reported in 60 F. (2d) 97. Its opinion on motion for leave to reargue (R. 77–79) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1932. (R. 80.) A petition for rehearing was denied August 5, 1932. (R. 80.) The time within which petition for a writ of certiorari might be filed was extended to December 4, 1932, by an order of an Associate Justice of this Court made on October 24, 1932. (R. 94.) Petition for a writ of certiorari was filed December 3, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in the particular circumstances of this case a suit to recover an overpayment of income tax for the year 1918 may be maintained against the Collector of Internal Revenue in office in 1918 and/or against his successor.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 9–11.

STATEMENT

This was an action against two former Collectors of Internal Revenue to recover an alleged overpayment of income tax for the year 1918. The case was tried by the District Court without a jury. The trial court made no special findings of fact, but the facts as stated in its opinion (R. 56–57) and as they

appear elsewhere in the record may be summarized as follows:

Petitioner paid its taxes for 1918 to the respondent Malley. (R. 17.) It filed a claim for refund which also contained a request that a portion of the amount claimed should be applied to a deficiency for the year 1917. (R. 47.) The Commissioner of Internal Revenue signed a schedule of overassessments showing an overassessment to petitioner for 1918, which he sent in 1923 to the respondent Nichols, respondent Malley's successor as Collector. (R. 37.) On January 3, 1924, Nichols allocated part of the stated overassessment for 1918 to the payment of deficiencies in petitioner's income taxes for the years 1915, 1916, and 1917. (R. 56–57.) The total credit which petitioner had asked in its claim for refund to be applied to earlier tax liability was $48,563.39, while the amount actually credited by the allocation made by Nichols was $74,648.39. On February 18, 1924, the Commissioner approved this action and paid the balance of the overassessment to the petitioner. (R. 57.) At the time the 1918 assessment was in part credited against the 1915, 1916, and 1917 deficiencies, collection of the deficiencies for those years was barred by the statute of limitations. (R. 16.) No refund claim for 1915, 1916, or 1917 taxes was ever filed, but on July 24, 1929, petitioner filed a claim for refund of the portion of the 1918 taxes applied as a credit against liability for earlier

years, as stated above. (R. 39–40.) This claim was rejected December 17, 1929. (R. 46.)

The petitioner began the present suit by attachment February 3, 1930 (R. 2), and filed its declaration against Malley and Nichols in the District Court on March 26, 1930 (R. 3). The District Court gave judgment for the defendants. (R. 59.) The Circuit Court of Appeals affirmed the judgment of the District Court (R. 80), and thereafter denied a petition for rehearing (R. 80) and a motion for reargument (R. 93).

ARGUMENT

The court below held that no question of law was raised on the record for its consideration by petitioner's assignments of error in that court. The assignments of error, in the view taken by the Circuit Court of Appeals, related either to matters of fact or conclusions of law not open to review by an appellate court because there were no special findings of fact and no exceptions to rulings on matters of law duly taken in the course of trial and preserved by bill of exceptions, as required by Sections 700 and 649 of the Revised Statutes, as amended. (*Infra*, p. 10.)

The decision below may be adequately rested on this ground. See *Fleischmann Const. Co.* v. *United States*, 270 U. S. 349, 355 et seq.; *Mueller Grain Co.* v. *American State Bank*, 275 U. S. 493; *Ingram-Day Lumber Co.* v. *McLouth*, 275 U. S. 471, 474;

Lewellyn v. *Electric Reduction Co.*, 275 U. S. 243, 248; *Wilson* v. *Merchants' Loan & Trust Co.*, 183 U. S. 121, 127; *Martinton* v. *Fairbanks*, 112 U. S. 670. See also *Wilmington Steamboat Co.* v. *Sturgess*, 55 F. (2d) 831, 832–833 (C. C. A. 3d); *Stinson* v. *Business Men's Accident Association*, 43 F. (2d) 312, 314 (C. C. A. 10th); *United States* v. *Smith*, 39 F. (2d) 851 (C. C. A. 1st).

Petitioner does not specifically assign as error in this Court this holding of the court below and the question is not discussed in the petition or brief in support. As it seems clear that the petitioner did not take proper steps to preserve for review the questions which he presents, the judgment below was correct, and consideration of petitioner's arguments on the merits is therefore not necessary.

Even if it be assumed that petitioner was in a position to argue the case on the merits, nevertheless the court below correctly affirmed the judgment of the District Court.

As this suit was not brought against the United States it is unnecessary to discuss the suggestion of the court below that petitioner could have sued the United States as upon an account stated after the signing in 1923 of the certificate of overassessment by the Commissioner. See *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258. Whatever petitioner's rights in such a suit, if instituted in time,

might be, we submit that recovery can not be had against either of the present respondents in this cause. Petitioner concedes (Pet. p. 2) "that it has no cause of action against the defendant Nichols." See *Routzahn* v. *Reeves Brothers Co.*, 59 F. (2d) 915 (C. C. A. 6th), certiorari denied, October 24, 1932 (No. 398, October Term, 1932). As to respondent Malley, however, petitioner contends that it has a valid cause of action.

We believe that Section 3226 of the Revised Statutes, as amended (*infra*, p. 9), bars recovery. That section provides that suits for the recovery of any internal-revenue tax must be brought within five years of the time of payment of the tax or within two years of the disallowance of a timely claim for refund. This suit, begun in 1930, complies with neither of these requirements. It was not begun within five years of the payment of the taxes for 1915, 1916, and 1917, even if the crediting of the 1918 overassessment in 1924 be regarded as payment. It was not brought within five years after the payment of taxes for 1918. It was not brought within two years of the disallowance of the claim as to 1918, filed in 1923, because that claim was allowed. Petitioner argues that the suit was brought within two years of the disallowance of its claim for refund filed on July 24, 1929. But that claim was filed more than four years after payment, was

therefore barred by the statute (Revised Statutes, sec. 3228, as amended), and no action can be based on the denial of an invalid claim for refund. See *Moses* v. *United States* (C. C. A. 2d), decided November 14, 1932, reported in Prentice-Hall Fed. Tax Service (1932), Vol. 1, Par. 2042. Compare *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U. S. 269.

Petitioner further contends that the decision below conflicts with *American Hide & Leather Co.* v. *United States*, 284 U. S. 343. Petitioner's argument is directed not at the decision now sought to be reviewed, but to certain statements made by the court below in denying a motion for oral reargument (Pet. Br. p. 19), filed after denial of a petition for rehearing. The motion was denied because it was made out of time, but the court discussed *obiter* some of the matters upon which further consideration had been urged. It is clear that this Court should not be called on to review such dicta and we see no reason to burden the Court with a discussion thereof.

Extended discussion of petitioner's other contentions seems unnecessary. They appear to present no grounds sufficient to warrant the granting of certiorari. The judgment of the court below may be supported on several adequate grounds, which are unaffected by the arguments now advanced on behalf of petitioner.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The questions which petitioner seeks to present are not open upon the record. Furthermore, the case depends in large measure on its peculiar facts. The petition should be denied.

Respectfully submitted.

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DECEMBER, 1932.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 343:

SEC. 1014 (a). Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to

which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

[U. S. C., Title 26, Sec. 156.]

Revised Statutes:

SEC. 649. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, agree to waive a jury by a stipulation in writing filed with the clerk or by an oral stipulation made in open court and entered in the record. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

[U. S. C. Sup. V, Title 28, Sec. 773, as amended by Act of May 29, 1930, c. 357, 46 Stat. 486.]

SEC. 700. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

[U. S. C., Title 28, Sec. 875; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 936.]

SEC. 3228. All claims for the refunding or crediting of any internal-revenue tax alleged

to have been erroneously assessed or collected * * * must * * * be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. * * *

[U. S. C., Title 26, Sec. 157.]

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No. 537

In the Supreme Court of the United States

OCTOBER TERM, 1932

ARTHUR C. HARVEY COMPANY, PETITIONER

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 537

ARTHUR C. HARVEY COMPANY, PETITIONER

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, Former Collectors

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 56–59) is reported in 52 F. (2d) 885. The opinion of the Circuit Court of Appeals for the First Circuit (R. 63–70) is reported in 60 F. (2d) 97. Its opinion on motion for leave to reargue (R. 85–87) is reported in 61 F. (2d) 365.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1932. (R. 87.) A petition

for rehearing was denied August 5, 1932. (R. 88.) On October 24, 1932, the time within which petition for a writ of certiorari might be filed was extended to December 4, 1932, by an order of an Associate Justice of this Court. (R. 100.) Petition for a writ of certiorari was filed December 3, 1932, and granted January 9, 1933. (R. 100.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether under Sections 649 and 700 of the Revised Statutes, as amended, any question of law was raised by the record for consideration by the Circuit Court of Appeals.

2. Whether recovery of the tax sued for is barred by Section 3226 of the Revised Statutes, as amended.

3. Whether under Section 3226, as amended by the Revenue Act of 1924, taxes paid voluntarily in 1919 may be recovered in a suit brought in 1930.

4. Whether the petitioner overpaid its tax for the six months' period ending June 30, 1918. This involves the questions:

> (a) Whether after the approval in 1924 of a certificate of overassessment of 1918 taxes the Commissioner could in 1929 reaudit the 1918 tax to determine whether there had been an overpayment of such tax.

(b) Whether the record establishes that the computation of the tax made by the Commissioner in 1929 was erroneous.

(c) Whether the tax for the six months' period in question should be computed pursuant to Section 205 (a) or Section 226 of the Revenue Act of 1918.

STATEMENT

This is an action against two former Collectors of Internal Revenue to recover an alleged overpayment of income taxes for the first six months of 1918. (R. 3–8, 14.) Trial by jury was waived in writing. (R. 12, 15.) The trial court made no special findings of fact,[1] but the facts as stated in its opinion (R. 56–57) and as they appear elsewhere in the record may be summarized as follows:

Prior to 1918 the petitioner kept its books of account upon the basis of a fiscal year ending June 30th, but filed its income-tax returns upon the calendar year basis.[2] (R. 45, 65.) To conform to section 212 (b) of the Revenue Act of 1918, p. 38, *infra,* which required corporations keeping their books on a fiscal year basis to file their returns on that basis, the petitioner in March, 1919, filed a return for the first six months of 1918, on which return its tax for the six months' period was as-

[1] The petitioner made a request for findings of fact and rulings of law (R. 51–56), but no special findings were made or refused, nor were the requested rulings of law either made or refused. No exception to a refusal to make findings or to a refusal to rule as requested was taken in the course of the trial. (R. 21, 63–64.)

[2] See Article 211, Treasury Regulations No. 33 (Revised).

sessed at $302,438.83. (R. 65.) Although the record does not contain the details of this assessment, it was apparently computed pursuant to Section 226 of the Revenue Act of 1918. (R. 45, 50, 65–66.) The Commissioner of Internal Revenue abated $75,461.39 of this assessment (R. 6), and thereafter, some time in 1919, the petitioner voluntarily (R. 17, 66) paid the balance, $226,977.44, to the respondent Malley [3] (R. 15, 66).

On April 9, 1923, petitioner filed a combined claim for refund and credit of taxes alleged to have been illegally assessed for the six months' period ending June 30, 1918. (R. 46–49, 66.) By this claim petitioner sought the refund of $107,826.61 and credit against taxes for 1915, 1916, and 1917 of $48,563.39. (R. 46–47, 48, 66.) On May 7, 1923, the Commissioner determined that the correct tax for the first six months of 1918 was $146,098; that the original assessment was excessive in the amount of $156,340.83 (R. 23–26, 31, 66); and

[3] In September, 1919, petitioner filed an amended return showing income for the full fiscal year from June 30, 1917, to June 30, 1918, and took as the tax due for the first six months of 1918 the same proportionate part of the tax for the entire fiscal year, computed at the 1918 rates, as the portion of the fiscal year falling in 1918 was of the entire fiscal year. This return showed a resulting tax of $234,088.50. In October, 1920, petitioner filed a second amended return for the first six months of 1918, which return showed a tax due of only $127,651.08. (R. 54, 66.) What action, if any, the Commissioner took with respect to these returns does not appear. The petitioner states (Br. p. 12) that the Commissioner "accepted and approved" these returns. See footnote 11, p. 28, *infra*.

that therefore, after making allowance for the $75,461.39 previously abated, there had been an overpayment of taxes for the period in question of $80,879.44. This computation of the tax was apparently made under Section 205 (a) of the Revenue Act of 1918. (R. 24–26, 66.)

In December, 1923, the Commissioner issued his Schedule of Overassessments for the six months period ending June 30, 1918, showing the overpayment of $80,879.44. (R. 37.) Pursuant to this Schedule the respondent Nichols, who was then the Collector, on January 31, 1924, credited $74,648.39 to deficiencies for 1915, 1916, and 1917. (R. 15, 49.) On February 18, 1924, the Commissioner approved this action, and the balance of the $80,879.44 was either paid to or credited to other acknowledged tax liabilities of the petitioner. (R. 15, 37, 41, 57, 67.) The respondents conceded in the trial court that at the time the supposed 1918 overpayment was in part credited against deficiencies for prior years, the collection of such deficiencies was barred by the statute of limitations.[4] (R. 16, 20.)

On July 24, 1929, petitioner filed a claim for refund of that portion of the 1918 tax which had been applied as a credit against deficiencies for prior years, the claim being based upon Sections 607 and 609 of the Revenue Act of 1928. (R. 39–40.) On December 17, 1929, this claim was rejected

[4] See Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 264, p. 40, *infra*.

on the ground that the original overassessment had been erroneously allowed.[5] (R. 45–46, 49–50.)

No claim for refund of 1915, 1916, or 1917 taxes was filed by the petitioner.

The petitioner began the present suit by attachment on February 3, 1930 (R. 2) and filed its declaration on March 26, 1930 (R. 3–15). Count I of the declaration, which applied to the two respondents jointly and severally, set forth the substance of the foregoing facts, and alleged that "the defendants or either of them owes it" $74,648.39. Count II was against the respondent Malley for money had and received, and Count III was a like declaration against Nichols. (R. 8.) Both respondents answered by way of a general denial.[6]

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[5] In the petition for certiorari (p. 4) petitioner asserts that the Commissioner repudiated his original determination " solely to avoid the effect of Section 609 of the Act of 1928." This statement is without support in the record. The petition also asserts (p. 5) that at the trial counsel for respondents admitted in open court " that the previous determination or allowance of the overpayment was right," and (p. 6) that on the hearing in the Circuit Court of Appeals " Counsel for the Government again admitted in open Court (1) that the Commissioner's determination of May 7, 1923, was right." There is no support for these statements in the record (R. 16, 80–81), and the attorney who argued the case for the respondents denies that such an admission was made. See footnote 14, p. 34, *infra*.

[6] Each respondent filed a motion to compel the petitioner to elect against which of the respondents it would proceed. (R. 10–11, 15.) The petitioner filed a motion for further particulars as to the nature of the defenses to be relied upon. (R. 12–14.) The respondents' motions were overruled but no specific ruling was made on petitioner's motion. (R. 15, 63.)

(R. 9–10, 15.) The District Court gave judgment for the respondents on the ground that under Sections 607 and 609 of the Revenue Act of 1928 the credit of the portion of the alleged 1918 overpayment against the barred taxes for prior years was not void, and that no refund thereof could be made. (R. 56–59.)

Upon appeal to the Circuit Court of Appeals the judgment was affirmed. (R. 87–88.) Although holding that no question was raised on the record for the consideration of the court by petitioner's assignments of error (R. 64–65), the Circuit Court of Appeals expressed the opinion that the determination of petitioner's taxes for the first six months of 1918 was governed by Section 226 rather than by Section 205 (a) of the Revenue Act of 1918; that, so far as the record disclosed, the Commissioner's original assessment, made under Section 226, was correct; that the certificate of overassessment had been erroneously issued; that there was no overpayment of 1918 taxes; and that the Government was not in possession of any money justly belonging to the petitioner. (R. 65–70.) Thereafter the court denied a petition for rehearing (R. 88) and a motion for leave to argue orally on the question of the proper method of computing the taxes (R. 99).

In its petition for certiorari (pp. 2–3) and brief on the merits (p. 25) petitioner concedes that it has no cause of action against the respondent Nichols.

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 36–41.

SUMMARY OF ARGUMENT

I

Because of petitioner's failure to secure from the trial court special findings of fact or rulings upon propositions of law, duly excepted to and preserved by bill of exceptions, no questions of law were presented by the record for consideration by the court below.

II

There is no distinction between an action for money had and received based upon an overpayment of taxes and an action to recover taxes illegally exacted, and the present action is subject to the limitations applicable to such latter action.

III

Recovery of the tax sued for is barred by Section 3226, R. S., as amended, since suit was not brought within five years of the payment of the tax nor within two years after disallowance of a timely claim for refund. Although the first claim for refund was timely, that claim was allowed. The second claim was filed too late. The instant case is not affected by the recent decision of this Court in *United States* v. *Memphis Oil Co.*, decided January

9, 1933, since it raises no question as to an insufficient claim which, by amendment after the statute has run, is made sufficient prior to final action thereon by the Commissioner.

IV

The tax sued for may not be recovered since it was paid voluntarily prior to the Revenue Act of 1924. The instant action does not fall within Section 1014 (a) of that Act, which amended Section 3226, R. S., so as to permit suits to be maintained whether or not the tax was paid under protest, since Section 1014 (a) may not be given a retroactive application so as to impose a personal liability upon a Collector for an act which gave rise to no liability at the time of the act.

V

Petitioner did not overpay its 1918 tax and therefore is not entitled to recover any portion thereof. Although the Commissioner in 1924 approved a certificate of overassessment showing an overpayment of 1918 taxes, by a subsequent computation of the tax in 1929 he determined that the certificate of overassessment was erroneous and that there had been no overpayment. In the absence of evidence to the contrary, the Court must presume the Commissioner's final computation of the tax to be correct.

ARGUMENT

I

NO QUESTIONS OF LAW WERE RAISED BY THE RECORD FOR CONSIDERATION BY THE CIRCUIT COURT OF APPEALS

Trial by jury was waived in writing (R. 12, 15) and the case tried by the District Judge. Although the petitioner filed a request for findings of fact and rulings of law (R. 51–56), no special findings were made or refused, nor were the requested rulings of law either made or refused. No exception to a refusal to make findings or to a refusal to rule as requested, nor any exceptions to any rulings of law were taken by the petitioner during the course of the trial, and duly preserved by a bill of exceptions. (R. 21, 63–64.) No questions of law favorable to the petitioner were raised by the pleadings. (R. 3–10.) Each of the assignments of error (R. 60–61) related either to matters of fact or to conclusions of law embodied in the opinion of the trial judge (R. 56–59).

Although the Circuit Court of Appeals expressly recognized the foregoing facts (R. 63–65) it proceeded to pass upon the merits of the case. We think the court should have dismissed the appeal on the ground that the record raised no questions of law, with respect to the merits of the case, for its consideration. It has been repeatedly held under Sections 649 and 700 of the Revised Statutes, as amended, p. 36, *infra*, that—

> in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute. * * * To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. * * * *Fleischmann Co.* v. *United States,* 270 U. S. 349, 355 *et seq.*

See *Mueller Grain Company* v. *American State Bank of Omaha,* 275 U. S. 493; *Ingram-Day Lumber Co.* v. *McLouth,* 275 U. S. 471, 474; *Lewellyn* v. *Electric Reduction Co.,* 275 U. S. 243, 248; *Wilson* v. *Merchants' Loan & Trust Co.,* 183 U. S. 121, 127; *Martinton* v. *Fairbanks,* 112 U. S. 670. See also *Wilmington Steamboat Co.* v. *Sturgess,* 55 F. (2d) 831, 832–833 (C. C. A. 3d); *Stinson* v. *Business Men's Accident Ass'n.,* 43 F. (2d) 312, 314 (C. C. A. 10th); *United States* v. *Smith,* 39 F. (2d) 851 (C. C. A. 1st).

It is true that after the entry of the judgment and opinion of the trial court exceptions were taken to alleged rulings of the court (R. 21–22), but clearly such exceptions were not to rulings "in the course of the trial." *Wilson* v. *Merchants' Loan &*

Trust Co., 183 U. S. 121, 127, *supra*; *Martinton* v. *Fairbanks*, 112 U. S. 670, 673, *supra*; *United States* v. *Smith*, 39 F. (2d) 851, 854 (C. C. A. 1st), *supra*.

II

THE PRESENT ACTION IS ONE FOR THE RECOVERY OF TAXES ALLEGED TO HAVE BEEN ILLEGALLY EXACTED AND IS SUBJECT TO THE LIMITATIONS APPLICABLE TO SUCH ACTIONS

In its petition for certiorari (pp. 23–24) petitioner stated with respect to *Bonwit-Teller & Co.* v. *United States*, 283 U. S. 258, that—

> While there the suit was actually brought against the United States and based upon the Certificate of Overassessment, there is nothing in that opinion to indicate that the *same suit might not have been brought against the Collector* for "money had and received" as "evidenced by" the Certificate of Overassessment. (Italics ours.)

This statement would seem to indicate that petitioner intended to argue in this Court that recovery of the amount sued for could be had against former Collector Malley in a suit brought in a District Court on an account stated—based upon the certificate of overassessment. But in its brief on the merits petitioner apparently concedes that such a suit can be brought only in the Court of Claims *against the United States*, and states that its right to recover upon Count II of the declaration is not *upon an account stated*, but is for money had and received as "evidenced by the Certificate of Overassessment." (Br. pp. 25, 30–31.)

This alleged basis of recovery is discussed by petitioner, as though it were an alternative cause or theory of action. Thus, recovery of the sum in question is sought (Pet. Br. p. 4.)—

> either (1) as *1918 taxes wrongfully collected and credited,* as alleged in Count I of the plaintiff's declaration * * * or (2) as *"money had and received" by the defendant Malley,* as alleged in Count II of the plaintiff's declaration * * *.

But if, as petitioner now concedes, neither Count I nor Count II be deemed to involve an action upon an account stated,[7] we believe that Counts I and II,

[7] While petitioner's present theory of the case seems to require no consideration of the question, we desire to make clear our position that no action is maintainable against a Collector upon a certificate of overassessment on the theory of an account stated.

Assuming that an action against *the United States* as upon an account stated would, upon the facts of this case, be maintainable (Cf. *Daube* v. *United States*, 59 F. (2d) 842, 1 F. Supp. 771, (C. Cls.), now pending on petition for writ of certiorari, No. 634, present term) if instituted in time, it is clear that recovery can not be had against the respondent Malley upon that theory. As the court below observed, he had nothing to do with the issuance of the certificate of overassessment, nor was he privy to any promise therein contained, either express or implied, to refund an overpayment. The action upon the certificate of overassessment is founded upon an implied promise to pay, made by the party acknowledging the indebtedness stated in the account. *United States* v. *Kaufman*, 96 U. S. 567, 570; *United States* v. *Savings Bank*, 104 U. S. 728, 733; *Chesebrough* v. *United States*, 192 U. S. 253, 263; *Bonwit-Teller & Co.* v. *United States*, 283 U. S. 258, 265. The implied promise of the Commissioner

though pleaded alternatively, are in fact indistinguishable. The allegation that the respondent Malley has received and possesses money to which petitioner is rightfully entitled, depends for proof upon a showing that Malley wrongfully collected a tax from petitioner. Sec. 3226, R. S., p. 36 *infra*, prescribes the only permissible procedure "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * *," and as this Court pointed out in *Lewis* v. *Reynolds*, 284 U. S. 281, 283, "The action to recover on a claim for refund is in the nature of an action for money had and received." See also *United States* v. *Memphis Oil Co.*, No. 308, present term, decided January 9, 1933; *Routzahn* v. *Reeves Bros. Co.*, 59 F. (2d) 915, 917 (C. C. A. 6th), certiorari denied, October 24, 1932, No. 398, present

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plainly does not serve to bind Malley, or to fasten on him a personal liability to pay a refund, the validity of which he has not acknowledged and against which he has valid defenses. *Moses* v. *United States*, 61 F. (2d) 791, 793 (C. C. A. 2d). Cf. *United States* v. *Swift & Co.*, 282 U. S. 468, 474–475. Agreement between the parties is the essence of an account stated, and an action founded on such an account is based not upon the original liability, but upon the new promise to pay the agreed amount of liability. See *Nutt* v. *United States*, 125 U. S. 650, 655; *Falcone* v. *Paradiso*, 60 App. D. C. 348, 350; *Columbia River Packing Co.* v. *Tallant*, 133 Fed. 990, 995 (C. C. D. Ore.); *Patillo* v. *Allen-West Commission Company*, 108 Fed. 723, 726 (C. C. A. 8th). In the instant case there was obviously no agreement between petitioner and Malley, and no promise on Malley's part to pay an acknowledged and ascertained indebtedness.

term; *Hartwell Mills* v. *Rose* (C. C. A. 5th), decided November 3, 1932.

While it may be conceded that the theory upon which an action for recovery of taxes is permitted against a Collector is that he improperly retains funds belonging to another, and that the action is therefore basically similar to an ordinary contract action for money had and received, we submit that no action for money had and received based upon an overpayment of taxes will lie against a Collector independently of the action to recover a tax illegally or erroneously collected. Accordingly, in order to succeed in the present suit, petitioner must show compliance with all the requirements prescribed for the maintenance of a suit to recover a tax.

III

RECOVERY OF THE TAX SUED FOR IS BARRED BY SECTION 3226 OF THE REVISED STATUTES, AS AMENDED

Section 3226 of the Revised Statutes, as amended,[8] (U. S. C., Title 26, Sec. 156) pp. 36, 37, *infra,* provides that no suit for the recovery of taxes erroneously assessed or collected shall be maintained in any court "until a claim for refund or credit has been duly filed with the Commissioner of Internal

[8] This section was further amended by Section 1103 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286 (U. S. C., Sup. VI, Title 26, Sec. 156), but by Section 1103 (b) of that Act suits instituted before the effective date of the Act are not affected by the amendments contained in Section 1103 (a).

Revenue, according to the provisions of law in that regard," and that *no such suit shall be begun*—

> after the expiration of five years from the date of the payment of such tax * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.

From an early date it has been recognized that actions against Collectors to recover taxes paid are statutory proceedings (*Arnson* v. *Murphy,* 109 U. S. 238, 243; 115 U. S. 579, 584), and that the Federal statutes provide an exclusive method or system by which Federal taxes illegally exacted may be recovered (*Graham* v. *Dupont,* 262 U. S. 234, 255). The particular statute here in question is one of long standing, and the courts have interpreted it to require strict compliance with the conditions laid down for recovery. *Cheatham* v. *United States,* 92 U. S. 85; *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269, 272–273. In commenting upon the statute in *Tucker* v. *Alexander,* 275 U. S. 228, 231, the Court said:

> Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States.

See also *United States* v. *Michel,* 282 U. S. 656, 658; *United States* v. *Mahoning Coal R. R. Co.,*

51 F. (2d) 208 (C. C. A. 6th), certiorari denied, 285 U. S. 559.

The instant suit does not meet the statutory requirements. Although the taxes were paid in 1919 (R. 15, 66), the suit was not begun until 1930. It thus was not brought within five years of payment.

Nor does the action fall within the provision permitting suit within two years after disallowance of a claim for refund. The only *timely* claim for refund in the instant case, that of April 9, 1923, was *allowed* in 1924. (See pp. 4–5, *supra*.) The statute does not authorize the filing of a suit upon the allowance of a taxpayer's claim for refund. As the court said in *Bonwit-Teller & Co.* v. *United States*, 283 U. S. 258, 265:

> This case is not within the clause giving two years after disallowance, because here the claim was allowed.

If the fact that the Commissioner credited a greater amount of the alleged overpayment of 1918 taxes to unpaid taxes for prior years than petitioner requested to be so credited be construed as a rejection of the claim, then suit had to be brought within two years thereafter. Cf. *Moses* v. *United States*, 61 F. (2d) 791, 795 (C. C. A. 2d). Clearly, a suit in 1930 did not meet the requirements of the statute.[9]

Petitioner contends that by the claim for refund filed on July 24, 1929 (R. 39–40), it reasserted its

[9] The petitioner's case is not helped even if the credit in 1924 of the alleged overpayment of 1918 taxes to the unpaid deficiencies for 1915, 1916, and 1917 be regarded as a pay-

claim filed on April 9, 1923; that thereafter, in December, 1929, its claim was for the first time disallowed; and that the present suit was brought within two years of such disallowance, so that the suit meets the requirements of Section 3226, R. S. This argument, though ingenuous, is, we think, unfounded.

The claim of April 9, 1923 (R. 46–47, 48, 66), was predicated upon an alleged overpayment of 1918 taxes. The claim of July 24, 1929 (R. 39–40), was based upon a void credit of a supposed overpayment of 1918 taxes to barred deficiencies for prior years. The second claim did not concern itself with the subject matter of the first claim, i. e., the amount of taxes properly owing for the first six months of 1918. The second claim *assumed* that the Commissioner in allowing the first claim, had properly computed the taxes, but complained that the overpayment had been erroneously disposed of—although to a large extent the disposition was made at the request of petitioner. If the second claim be regarded as a new and distinct claim, as we think it must be, it was untimely and barred by the statute, since it was filed more than four years after the payment of the tax. See Section 3228, R. S.,

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ment of taxes for the prior years (see *Routzahn* v. *Reeves Bros. Co.*, 59 F. (2d) 915, 917 (C. C. A., 6th), certiorari denied October 24, 1932, No. 398, present term; but cf. *Parks & Woolson Machine Co.* v. *United States*, 58 F. (2d) 768 (C. Cls.), certiorari denied October 17, 1932, No. 279, present term), since the instant suit was brought "more than five years after such payment." Moreover, petitioner filed no claim for refund of 1915, 1916, and 1917 taxes.

as amended, p. 37, *infra*. Clearly no action can be based upon the denial of an invalid claim for refund. See *Moses* v. *United States*, 61 F. (2d) 791, 794 (C. C. A. 2d); cf. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269.

But petitioner contends that the second claim for refund was not a fresh claim but merely a reassertion of the original claim, and that, therefore, the disallowance of the second claim was really the disallowance *pro tanto* of the first claim. This contention would seem to be adequately answered by the Circuit Court of Appeals when it said (R. 68):

> a claim for refund barred by the statute can not be revived by filing a new claim and basing an action on its denial.

In closely similar circumstances it has been held that where a second refund claim is filed almost four years after rejection of the first claim, such latter claim, raising no new issue and involving no new assessment, does not operate to save the rights of the taxpayer which had been barred by Section 3226, R. S. *B. Altman & Co.* v. *United States*, 40 F. (2d) 781 (C. Cls.), certiorari denied, 282 U. S. 863.

Petitioner seems to place some reliance upon *United States* v. *Memphis Oil Co.*, No. 308, present term, decided January 9, 1933. That case held that "a general claim for refund, not specifying grounds, is subject to amendment until final rejection irrespective of a limitation running in the interval." See *United States* v. *Factors & Finance*

Co., and *United States* v. *Henry Prentiss & Co.*, respectively, Nos. 141 and 234, present term, decided January 9, 1933. Unlike the *Memphis Oil Co.* case, the instant case raises no question as to an insufficient claim which, by amendment after the statute has run, is made sufficient prior to final action thereon by the Commissioner. Here the original claim for refund was regular in form and substance and met all the requirements of the statute. Moreover, contrary to the situation in the *Memphis Oil Co.* case, it was promptly and formally acted upon by the Commissioner, and the action of the Commissioner was not questioned by petitioner for nearly six years. Cf. *Moses* v. *United States,* 61 F. (2d) 791, 795 (C. C. A. 2d); *Naumkeag Steam Cotton Co.* v. *United States* (C. Cls.), decided January 9, 1933; *Bryant Paper Co.* v. *Holden,* (C. C. A. 6th), decided December 16, 1932.

If it is too late to reopen the question of the tax liability by amendment or otherwise after the claim has been finally rejected (*United States* v. *Memphis Oil Co., supra*), *a fortiori* it would seem too late to reopen that question after a claim has been formally acted upon and allowed. In the *Altman case, supra,* the Court of Claims said (p. 784):

> Section 3226, Revised Statutes, manifestly does not contemplate the repetition of contentions for refund in such a way and at such times as to toll the running of the limitation period. The purpose of limiting suits to recover alleged illegal tax exactions is

> evident, and if plaintiff by repeating its contentions in two refund claims may establish jurisdiction to sue, despite the limitation prescribed in the law, litigation would be prolonged indefinitely. *The act of the Commissioner in rejecting the second refund claim is without legal significance, for when it was filed and afterwards rejected plaintiff's right to sue had lapsed by limitation.* (Italics ours.)

It may be suggested, although petitioner does not specifically so argue, that although the second claim was untimely, the Commissioner did accept it, pass upon it, and formally reject it, and that thereby the Government waived its right to insist that the claim was filed too late. But it is well settled that no officer of the Government has authority, apart from statute, to waive a statute of limitations upon suits against the United States and its officers. *Finn* v. *United States,* 123 U. S. 227, 233; *De Arnaud* v. *United States,* 151 U. S. 483, 495–496. While certain conditions in connection with claims for refund may be waived by the Commissioner, the statute of limitations is not such a condition. *Tucker* v. *Alexander,* 275 U. S. 228, 231–232. Cf. Section 608 (b) (2) of the Revenue Act of 1928, c, 852, 45 Stat. 791, 874.

IV

THE TAX SUED FOR CAN NOT BE RECOVERED SINCE IT WAS PAID VOLUNTARILY PRIOR TO THE ENACTMENT OF THE REVENUE ACT OF 1924

The 1918 tax was paid voluntarily (R. 17, 66) some time in 1919 (R. 15, 66). Prior to the Reve-

nue Act of 1924 it was the settled rule in the Federal courts that there could be no recovery of a tax erroneously paid or illegally enacted unless it had been paid under duress or protest. This was true whether the suit was against the United States or against a Collector. See *Atchison T. & S. F. R. Co.* v. *O'Connor,* 223 U. S. 280; *United States* v. *New York & Cuba Mail S. S. Co.,* 200 U. S. 488; *Chesebrough* v. *United States,* 192 U. S. 253; *Swift Co.* v. *United States,* 111 U. S. 22; *Wright* v. *Blakeslee,* 101 U. S. 174, 179; *Fox* v. *Edwards,* 280 Fed. 413 (S. D. N. Y.); *Coffey* v. *Exchange Bank,* 296 Fed. 807 (C. C. A. 8th); cf. *United States* v. *P. Lorillard Co.,* 267 U. S. 471, 474.

In 1924 Section 3226 of the Revised Statutes, which sets forth the requisites for a suit or proceeding "in any court" to recover taxes illegally assessed or collected, was amended by Section 1014 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, p. 37, *infra,* which, for the first time, provided that suit might be maintained "whether or not such tax, penalty, or sum has been paid under protest or duress." This section was reenacted as Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, and is still in force. We contend that the 1924 amendment did not raise the bar against suits brought to collect taxes which were voluntarily paid prior to its enactment.

In *United States* v. *St. Louis, S. F. & T. Ry. Co.,* 270 U. S. 1, 3, this Court said:

> That a statute shall not be given a retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application.

See also *Union Pacific Railroad Company* v. *Laramie Stock Yards Company,* 231 U. S. 190, 199; *Fullerton Co.* v. *Northern Pacific,* 266 U. S. 435.

Pursuant to the foregoing rule of construction it was held in *Warner* v. *Walsh,* 27 F. (2d) 952 (D. Conn.), that the 1924 amendment of Sec. 3226, R. S. was prospective only, and that it was limited not only to suits begun after its passage but also to suits begun as a result of transactions arising after its passage and to payments made for sums collected thereafter. The same result was reached in *Harrison* v. *Lewellyn,* 28 F. (2d) 990 (W. D. Pa.), affirmed on other grounds, 35 F. (2d) 283 (C. C. A. 3d), and in *George Moore Ice Cream Co.* v. *Rose* (N. D. Ga.), decided September 28, 1931, affirmed, 61 F. (2d) 605 (C. C. A. 5th), now pending on petition for a writ of certiorari, No. 675, present term. See also *Rasmussen* v. *Brownfield-Carpet Co.,* 31 F. (2d) 89 (C. C. A. 9th). Cf. *Winant* v. *Gardner,* 29 F. (2d) 836 (C. C. A. 2d). In *Clift & Goodrich* v. *United States,* 56 F. (2d) 751 (C. C. A. 2d), certiorari denied, October 10, 1932, No. 162, October Term, 1932, it was held that the 1924 amendment did not enlarge the Government's liability where payment of taxes had not only been voluntary but had been made with full knowledge

of the facts; in that case payment had been made before 1924 and a suit instituted thereafter.

An action against a Collector to recover taxes paid to him is a personal one, and in some circumstances personal execution may issue against him. See *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 430; *Sage* v. *United States,* 250 U. S. 33. Prior to the amendment of Sec. 3226, R. S. in 1924 it was, of course, a personal defense to a suit against a Collector that the payment had been voluntarily made. (See *John B. Semple & Co.* v. *Lewellyn,* 1 F. (2d) 745, 748 (W. D. Pa.), affirmed 10 F. (2d) 1023 (C. C. A. 3d), and cases cited *supra.*) Accordingly, if the 1924 amendment be given a retroactive operation the effect will be to impose a personal liability upon a Collector where none existed at the time he acted. In the instant case the Collector from whom petitioner seeks to recover is no longer in office, and the transaction for which petitioner insists he is accountable occurred several years before the 1924 amendment. Thus, if petitioner's contention were sustained, conduct entailing no personal liability at the time would be rendered perilous after the event, and an unsuspected liability would be imposed upon an individual who would otherwise have a valid defense.

It is true that certain courts have given the 1924 amendment a retroactive application. *Farmers Loan & Trust Co.* v. *United States,* 64 C. Cls. 516; *Beatty* v. *Heiner,* 10 F. (2d) 390, 392 (W. D. Pa.),

reversed on other grounds, 17 F. (2d) 743. See also *Leach* v. *Nichols,* 42 F. (2d) 918, 921 (D. Mass.), reversed on other grounds, 50 F. (2d) 787 (C. C. A. 1st), 285 U. S. 165; *Weir* v. *McGrath,* 6 Am. Fed. Tax Rep. 8005, 8006 (S. D. Ohio), affirmed without opinion, 41 F. (2d) 1021 (C. C. A. 6th). In none of these cases does the question seem to have been given careful consideration, and we think that they are against the weight of the authority and the better reasoned view. It should be noted that in the *Farmers Loan and Trust Co. case, supra,* the suit was against the *United States.* It is arguable that Congress might validly surrender a defense theretofore available to the Government, but it is extremely doubtful if within constitutional limitations it could destroy individual defenses which had already vested, especially where the effect of such action would be to impose a personal liability upon a Collector after he had left office for an act which gave rise to no liability at the time of the act. See *Pritchard* v. *Norton,* 106 U. S. 124, 132; *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 426, and cases there cited in footnote 14.

V

PETITIONER DID NOT OVERPAY ITS 1918 TAX AND THEREFORE IS NOT ENTITLED TO RECOVER ANY PORTION THEREOF

If, as held by the Circuit Court of Appeals (R. 69–70), the record does not show that petitioner overpaid its 1918 tax, it is not entitled to recover

any part thereof. In *Lewis* v. *Reynolds,* 284 U. S. 281, this Court said (p. 283):

> *An overpayment must appear before refund is authorized.* Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded. (Italics ours.)

See also *United States* v. *Swift,* 282 U. S. 468, 472; *McCarl* v. *United States ex rel. Leland,* 42 F. (2d) 346 (App. D. C.), certiorari denied, 282 U. S. 839; *Magee* v. *United States,* 37 F. (2d) 763 (C. Cls.), affirmed on other grounds, 282 U. S. 422; *Daube* v. *United States,* 59 F. (2d) 842 (C. Cls.), 1 F. Supp. 771, now pending on petition for a writ of certiorari, No. 634, present term.

In the *Leland case, supra,* the Commissioner had notified the taxpayer of a deficiency for 1918 and an overassessment for 1919. The taxpayer challenged the ruling as to the deficiency by appeal to the Board of Tax Appeals, and while the appeal was pending brought suit to recover the amount of the overassessment. Recovery was denied on the ground that a taxpayer was entitled to a refund of overpayments "only in the event of a net balance in favor of the taxpayer," and that it could not be known until final determination of the amount of tax for 1918 whether such a net balance existed.

No difficulty arises from the fact that the Commissioner did not determine that petitioner had not overpaid its 1918 tax until after the assessment and collection of such tax was barred by the statute of limitations. The running of the statute does not extinguish the debt due from the taxpayer, but merely abrogates the remedy. See *United States* v. *Whyel*, 28 F. (2d) 30 (C. C. A. 3d), certiorari dismissed, 278 U. S. 664; *Wright & Taylor* v. *Lucas*, 34 F. (2d) 328 (W. D. Ky.), affirmed, 45 F. (2d) 75 (C. C. A. 6th), affirmed, 282 U. S. 409; *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309 (C. Cls.), affirmed, 282 U. S. 434; *United States* v. *John Barth Co.*, 27 F. (2d) 782 (C. C. A. 7th), reversed on other grounds, 279 U. S. 370. These decisions follow the rule as to debts in general in the absence of a contrary intent disclosed by the statute.[10] *Campbell* v. *Holt*, 115 U. S. 620; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633.

The conclusion for which we contend follows, because in an action for money had and received to recover taxes paid the taxpayer is not entitled to recover unless he establishes that the Government retains money which in equity belongs to the taxpayer. *Lewis* v. *Reynolds*, 284 U. S.

[10] The principle that the statute of limitations merely bars the remedy without extinguishing the liability is emphasized by *Stange* v. *United States*, 282 U. S. 270, and *Burnet* v. *Railway Equipment Co.*, 282 U. S. 295, holding that a waiver given after the expiration of the statute is a valid waiver. Cf. *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346; *Toxaway Mills* v. *United States*, 273 U. S. 781.

281, *supra; Champ Spring Co.* v. *United States,* 47 F. (2d) 1, 3 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Hartwell Mills* v. *Rose* (C. C. A. 5th), decided November 3, 1932; *Clift & Goodrich* v. *United States,* 56 F. (2d) 751 (C. C. A. 2d), certiorari denied October 10, 1932, No. 162, present term. See also *J. W. Carter Music Co.* v. *Bass,* 20 F. (2d) 390 (S. D. Tex.); *New York Life Ins. Co.* v. *Anderson,* 263 Fed. 527 (C. C. A. 2d), certiorari denied, *Anderson* v. *United States,* 256 U. S. 696; *United States* v. *Pacific Midway Oil Co.* (N. D. Cal.), decided December 31, 1931.

Petitioner's tax for the six months ending June 30, 1918, as based upon its original return for that period,[11] was originally assessed at $302,438.83 (R. 31, 65). Neither this return nor the details of the original assessment are in the record, but it seems that this assessment was made pursuant to Section 226 of the Revenue Act of 1918. (R. 45–50, 63–66.) Thereafter the Commissioner abated $75,461.39 of this assessment, and the balance of the tax,

[11] Petitioner asserts (Br. p. 12) that its *original* 1918 return was not for the six months period ending June 30, 1918, but for the entire fiscal year ending on that date. There is no support in the record for this statement. It is negatived by petitioner's claim for refund (R. 47) and the Commissioner's letter of December 17, 1929 (R. 49–50). The court below found to the contrary. (R. 65.) We are advised by the Bureau of Internal Revenue that an inspection of their files discloses that the first return filed by petitioner for 1918 was for the first six months of that year. Its first *amended* return was for the entire fiscal year. (R. 66; p. 4, *supra.*)

$226,977.44, was paid by petitioner in 1919. (R. 15, 17, 66.) On April 9, 1923, petitioner filed a claim for refund and credit of taxes for the first six months of 1918. (R. 46–47, 48, 66.) On May 7, 1923, the Commissioner determined that the correct tax for the six months' period was $146,098.00; that the original assessment was excessive in the amount of $156,340.83; and that after allowing for the $75,461.39 previously abated, there was an overpayment of $80,879.44. Apparently this computation of the tax was made under Section 205 (a) of the Revenue Act of 1918. (R. 23, 26, 31, 66.)

After petitioner had filed its second claim for refund, on July 24, 1929 (R. 39–40) the Commissioner recomputed petitioner's tax for the six months period in question and on December 17, 1929, advised petitioner that its correct tax was $302,438.83, the amount originally assessed; that the computation made in 1923, which produced the overassessment of $156,340.83, was erroneous; that the proper method of computing the tax was in accordance "with the original return which you filed" and pursuant to Section 226 of the 1918 Act. (R. 45–46, 49–50, 69.)

It thus appears that upon a reaudit of petitioner's tax liability, consequent to the second claim for refund, the Commissioner determined that the computation of 1923 was erroneous, and that petitioner had not overpaid its 1918 taxes. This conclusion was made the basis of the rejection of the

second claim for refund. Unless the record establishes that the Commissioner's last computation was erroneous there can be no recovery of 1918 taxes, under *Lewis* v. *Reynolds, supra,* no matter to what use, by way of an attempted credit or otherwise, they were put by the Commissioner.

The details of the Commissioner's 1929 computation of the tax are not in the record. It does appear that the computation was made in accordance with petitioner's original return (R. 49–50), but this return is not in the record. Whether the items of gross income, invested capital, and deductions as shown on the original return were the same as those used in the 1923 computation (see R. 24–26) does not appear. In the absence of evidence to the contrary, we submit that the Court must presume the Commissioner's last computation to be correct.

It seems reasonably clear that the Commissioner's 1923 computation was made pursuant to Section 205 (a) of the Revenue Act of 1918 (R. 24–26, 66), whereas his 1929 computation was made pursuant to Section 226 (R. 49–50), and the Circuit Court of Appeals assumed that this fact explained the difference in the amount of the tax as found by the Commissioner upon the two computations. Because of this assumption, apparently, the court deemed it necessary, if the 1929 computation were to be accepted, to determine which section was applicable; it ruled that Section 226 was applicable.

and that under that section the tax as originally assessed, so far as the record disclosed, was correct. (R. 69.) But since the details of the 1929 computation are not available it can not be known whether the difference in the amount of tax upon the two computations resulted solely from the application of different methods of computation. Moreover, petitioner argues (Br. pp. 9–10) that computation under either Section 205 (a) or Section 226, if properly made, would produce the same tax. If this contention is sound, the Commissioner did not err in 1929 in applying Section 226, and with no evidence to the contrary it will be presumed that his computation was accurate.

Furthermore, we believe, as the court below held, that Section 226 was the applicable statute. Section 205 (a) (p. 38, *infra*) has reference only to a taxpayer who "makes return for a fiscal year beginning in 1917 and ending in 1918." This provision does not cover petitioner's case, since, contrary to the assertion in its brief, its original return for 1918 was only for the first six months of that year and not for the entire fiscal year ending June 30, 1918. (See footnote 11, p. 28, *supra*.) Section 226 provides:

> That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the

> following December thirty-first. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year.

The last sentence above quoted seems clearly to apply to the present case. And while concededly the various regulations interpreting Sections 205 (a) and 226 are not altogether clear,[12] it has uniformly been held that Section 226 governs the computation of the tax where, as here, upon a shift from a calendar year basis to a fiscal year basis of return, a separate return is filed for the period between January 1, 1918, and the end of the fiscal year. *American Hide & Leather Co.* v. *United States,* 284 U. S. 343, 351; *Appeal of Henry D. Weed,* 2 B. T. A. 84; *Appeal of Coghlin Electric Co.,* 3 B. T. A. 1071.

Petitioner argues that even if the Commissioner properly applied Section 226, his computation of the tax was erroneous since, it is asserted, computation under that section, if done correctly, would produce the same amount of tax as computation under Section 205 (a). This contention is plainly wrong. Under Section 205 (a) the tax for that part of the fiscal year attributable to 1918 is found

[12] See Articles 25, 431, 1622, and 1624 of Treasury Regulations 45, issued under the Revenue Act of 1918, and Article 211 of Treasury Regulations 33 (Revised), issued under the Revenue Acts of 1916 and 1917.

by computing the income of the taxpayer for the entire fiscal year and the tax thereon under 1918 rates and taking the proportion of such tax which the portion of such fiscal year falling within 1918 is of the full fiscal year. See *Oglesby Coal Co.* v. *Commissioner,* 46 F. (2d 617 (C. C. A. 7th), certiorari denied, 284 U. S. 629. In cases falling under Section 226, p. 39, *infra*—

> the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included * * *.

This provision clearly contemplates "a separate return for such fractional portion of year entirely unrelated to any prior or future tax return."[13] *Appeal of Coghlin Electric Co., supra,* p. 1074. In view of the sharp difference in the methods of computation it would be only by accident that computation by either method would produce the same tax. (See R. 86–87.)

Petitioner argues that the "documentary evidence," i. e., the Commissioner's letter of May 7, 1923, the schedule of overassessment, etc., conclu-

[13] There is language in *American Hide & Leather Co.* v. *United States,* 284 U. S. 343, 351, which tends to support petitioner's view as to the method of computing the tax under Section 226, but we doubt the applicability of that language to the instant case in view of the fact that the precise problem here presented was not then before the Court.

sively shows that it overpaid its 1918 taxes.[14] This is but another way of stating petitioner's contention that the Commissioner did not have the right in 1929 to recompute the 1918 taxes. But as this Court pointed out in *Lewis* v. *Reynolds, supra* (p. 283):

> While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied.

Even if the present suit were based on an account stated the Government was free to impeach the account for mistake. See *United States* v. *Real Estate Savings Bank,* 104 U. S. 728, 733.

Moreover, it is questionable if petitioner is aided by his argument that the Commissioner was pre-

[14] Petitioner asserts (Br. pp. 4, 8) that counsel for the Government admitted in open court that the certificate of overassessment, the schedule of overassessment, and the schedule of refunds and credits were "valid documents," the inference of this assertion being that the Government admitted in open court that the computation of tax, as shown on such documents, was correct. The documents were, of course, "valid" in the sense that they were "official," and concededly they were duly prepared in the Bureau of Internal Revenue, but the record contains no admission by the Government that the computation of the tax shown on these documents was correct and unimpeachable. See footnote 5, p. 6, *supra.*

Petitioner also asserts (Br., pp. 8–9) that the District Court found as a fact that the Commissioner's determination of 1923 was correct and that petitioner had overpaid its 1918 taxes. No such finding appears in the record. It is true that the decision of the District Court proceeded upon the assumption that the 1918 taxes had been overpaid. (R. 56–59.)

cluded in 1929 from asserting that the 1918 tax was different in amount from the tax asserted in the 1923 certificate of overassessment. If the certificate finally fixed the tax liability it would seem that the action for taxes illegally collected had become merged in the account stated so that thereafter the taxpayer could sue only upon the account stated in an action against the United States. See *Parks & Woolson Machine Co.* v. *United States,* 58 F. (2d) 768, certiorari denied October 17, 1932, No. 279, present term, and footnote 7, p. 13, *supra.*

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY, 1933.

APPENDIX

STATUTES INVOLVED

Revised Statutes:

SEC. 649. Issues of fact in civil cases in any circuit [district] court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. (U. S. C., Sup. VI, Title 28, Sec. 773.)

SEC. 700. When an issue of fact in any civil cause in a circuit [district] court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. (U. S. C., Title 28, Sec. 875.)

SEC. 3226, as amended. *Suits for recovery of taxes wrongfully collected.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without

authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924." (U. S. C. App., Title 26, Sec. 156.)

SEC. 3228, as amended. *Claims for refundment; limitations.*—"(a) All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal

Revenue within four years next after the payment of such tax, penalty, or sum."

"(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. App., Title 26, Sec. 157.)

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1061, 1075—

SEC. 205 (a). That if a taxpayer makes return for a fiscal year beginning in 1917, and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title 1 of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title 1 of the Revenue Act of 1917, which the portion of said period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period. * * *

SEC. 212 (b). The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the

method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226.

SEC. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 264, 268—

SEC. 250 (d). The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed.

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the

Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

Revenue Act of 1928, c. 852, 45 Stat. 791, 874:

SEC. 607. *Effect of expiration of period of limitation against United States.*

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Sup. VI, Title 26, Sec. 2607.)

SEC. 609. Erroneous Credits (a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

(U. S. C., Sup. VI, Title 26, Sec. 2609.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 537.

(Certiorari Granted January 9, 1933, 287 U. S. .)

ARTHUR C. HARVEY COMPANY

vs.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS,
former Collectors of Internal Revenue.

BRIEF OF AMICUS CURIAE.

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IN THE

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vs.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS, former Collectors of Internal Revenue.

BRIEF OF AMICUS CURIAE.

Statement.

The *amicus curiae* is the attorney for the taxpayer in case of *Pathe Exchange, Inc.* v. *Edwards and Bowers*, former collectors, now pending in the United States District Court, Southern District of New York, in which the decision on a motion for judgment is being held in abeyance, pending the decision of this Court herein.

The brevity of the record and the statement of facts by the parties, make it unnecessary to set them forth in detail in this brief.

One of the causes of action alleged in the declaration upon which the suit is founded, is to recover an overpayment of income taxes paid to former Collector Malley, based upon a claim timely filed and duly allowed by the Commissioner of Internal Revenue and evidenced by his certificate of overassessment issued to the taxpayer (R. 3-8).

Questions Presented.

1. Whether the collector to whom the taxes were paid may be sued in an action to recover an overpayment of the taxes so paid where a refund claim has been timely filed by the taxpayer and duly allowed by the Commissioner of Internal Revenue and evidenced by his certificate issued to the taxpayer.

2. Whether §3226 of the Revised Statutes, as amended by 26 U. S. C. §156 (§1113 (a) of the Revenue Act of 1926) applies to this suit.

Summary of Argument.

1. The collector who receives the taxes may be sued in an action to recover an overpayment of the taxes erroneously paid and based upon an allowed claim just as he is suable in the case of a rejected claim. The right to sue a collector was given by the common law. The liability of the Collector, although regulated, is not one created by statute. There is no special remedy provided by statute for cases involving allowed claims. The argument that only the United States may be sued is based upon the inadmissible premise that there is a statute which provides an exclusive remedy. The statute authorizing suits against the collector in the district courts, 28 U. S. C. §41 (5), by its terms does not specifically prohibit suits based upon allowed claims. It specifically applies to "*all* cases arising under any law providing for internal revenue".

2. The contention that the suit is barred because it was not commenced within five years from the date of payment of the tax as required by R. S. §3226, is unsound and in direct conflict with *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258. The section does not apply to allowed claims. It provides for a short statute of limitations of two years

in case of *disallowed* claims, but is silent on the period of time within which a taxpayer may sue in the case of an allowed claim. The general statute of limitations applies. The taxpayer's cause of action accrued either on February 18, 1924, the date the Commissioner signed the Schedule of Refunds and Credits, or, on or about May 16, 1924, the date the certificate of overassessment was issued to the taxpayer. Until either one of said dates, no suit could properly have been commenced by the taxpayer. This action was commenced within the period prescribed by law.

ARGUMENT.

I.

A collector may be sued in an action to recover an overpayment of income taxes collected by him and based upon an allowed claim.

It is contended by the government that where a taxpayer has erroneously overpaid his income tax and has filed a timely claim for refund with the Commissioner of Internal Revenue who has allowed the claim and issued his certificate showing the allowance to the taxpayer, the sole remedy of the taxpayer to recover the amount allowed, is a suit against the United States in the Court of Claims and not an action against the Collector.[1] Several courts have assumed that the collector or under certain conditions the United States may be sued in the district court.[2]

[1] This is the holding in *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2). In the case at bar the court below did not state specifically that only the Court of Claims had jurisdiction, 60 F. (2d) 97, 100, but the Court in the *Moses* case, so construed it. 61 F. (2d) 793.

[2] See *Peerless Paper Box Co.* v. *Routzahn*, 22 F. (2d) 459; *National Tool Co.* v. *Routzahn*, 28 F. (2d) 914; *Brady* v. *United States*, 24 F. (2d) 205; *United Motors Corp.* v. *United States*, 44 F. (2d) 407. The latter two cases were expressly overruled by *Moses* v. *United States*, *supra*.

The right to sue a collector for an illegal or erroneous collection was given by the common law. It is in the nature of an action *indebitatus assumpsit* for money had and received and the law implied a promise to repay. *Elliott* v. *Swartwout*, 10 Peters 137; *Philadelphia* v. *Collector*, 72 U. S. (5 Wall.) 720, 730-2; *Collector* v. *Hubbard*, 79 U. S. (12 Wall.) 1, 12.[3]

The right to sue is not a creature of the statute. It is true that the common law right has been regulated and modified by statute. Now the tax need not be paid under protest or duress; a preliminary claim for refund must first be filed with the Commissioner of Internal Revenue; the taxpayer must await the determination of the Commissioner for a definite period of time before action may be commenced. Rev. Stat. §3226, as amended 26 U. S. C. §156;[4] *Sage* v. *United States*, 250 U. S. 33, 37.

In addition to the common law right, the reasonable implication of the statutes is that the taxpayer may main-

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[3] The leading case of *Elliott* v. *Swartwout, supra*, was a *customs* case. By statute, the common law action against the Collector in a customs case was taken away. See *Cary* v. *Curtis*, 3 How. 236; *Arnson* v. *Murphy*, 109 U. S. 238, 243; *Davies* v. *Miller*, 130 U. S. 284, 286; *Barney* v. *Rickard*, 157 U. S. 352, 356-8. This Court recognized the distinction between customs cases and internal revenue cases in *DeLima* v. *Bidwell*, 182 U. S. 1, 178.

[4] Revised Statutes, §3226, as amended by 26 U. S. C. §156; §1113 (a) Revenue Act of 1926, is in part as follows:

> §3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time * * *."

tain an action against the Collector. *Collector* v. *Hubbard*, *supra*; Rev. Stat. §§3220, 989.[5]

It is said by the government that the foregoing authorities and statutes do not permit an action against the collector where the claim has been allowed; that they have reference to an action based upon a rejected claim; that where the claim has been allowed and a certificate issued, the action is *not* one to recover a tax or a sum erroneously paid under the internal revenue law; that it is an action to recover a sum of money upon an account stated or a promise to pay by reason of the certificate issued; that the collector had nothing to do with the issuance of the certificate, was not privy to any promise therein contained, either express or implied, to refund the overpayment. The case of *Bowcit Teller & Co.* v. *United States*, 283 U. S. 258, 265, has been cited by the Court below in support of these propositions.[6]

It is respectfully submitted that the contentions advanced are based upon misconception of the nature of the action against the collector and the effect of the statutes thereon; that they are in conflict with the principles enunciated in the *Bowcit Teller* case; and that no distinction in law exists, with respect to the nature of the action against

[5] Revised Statute, §3220 as amended, 26 U. S. C. §149 Revenue Act of 1928, §3 reads in part:

"Except as otherwise provided by law in the case of income, war profits, excess profits, estate and gift taxes, the Commissioner of Internal Revenue * * * is authorized * * * also to repay to any Collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him."

Revised Statute, §989; 28 U. S. C. §842 reads in part:

"When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector, or other officer * * *, no execution shall issue against such collector * * * but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

See also R. S., §§3219, 3224, 3226, 3227, 3210 and 771.

[6] See opinion 60 F. (2d) 97, 100.

the collector, whether it be based upon an allowed claim or upon a rejected claim; and that there is no statute, so far as can be determined, which makes such a distinction or which provides a special remedy for a case of an allowed claim.

The duties of a collector are prescribed by statute (R. S. §3183). His principal duty is to collect taxes.

The duties of the Commissioner are prescribed by statute (R. S. §§3182, 3183). He is the only official in the Treasury Department possessing the power to allow or reject a claim for refund. *Girard Trust Co.* v. *United States*, 270 U. S. 163.

The argument of the government makes the *character* of the Commissioner's determination the decisive factor whether the collector may be sued. We submit that the common law liability of the collector was never made dependent upon the *character* of the Commissioner's determination; nor have the statutes modified it to that extent. His liability attaches when he receives the money. It is true the liability at first is only contingent. The statute (R. S. §3226) has provided the conditions under which this liability may become absolute. The basis of the action against the collector is his receipt of the tax and is personal to him.[7] Nowhere is there to be found a requirement that the basis of the action is dependent upon the character of the Commissioner's determination.

Diligent effort has disclosed no statute providing a special remedy to a taxpayer where the claim has been allowed, but not paid. If there were such a statute, it is conceded the remedy would be exclusive.[8] *United States* v.

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[7] See *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4, 5; *Sage* v. *United States*, 250 U. S. 33, 37; *Union Trust Co.* v. *Wardell*, 258 U. S. 537, and *Routzahn* v. *Reeves Brothers Co.*, 59 F. (2d) 915, C. C. A. 6; certiorari denied 287 U. S.

[8] See cases footnote 2, *supra*, where a special remedy has been fixed by statute in customs cases; also *Dooley* v. *United States*, 182 U. S. 222, 225.

Kaufman, 96 U. S. 567, 569; *United States* v. *Emery, Bird Thayer Realty Co.*, 237 U. S. 28, 31. In the latter case, the government contended that the Collector should have been sued. This Court said (p. 31):

> "The objection to the jurisdiction pressed by the Government is that the only remedy is a suit against the Collector. As the United States has received and keeps the money and would indemnify the Collector if he had to pay (Rev. Stat. 3220), the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that 'all laws relating to the collection, remission and refund of internal revenue taxes, so far as applicable' &c. are extended to this tax, c. 61, §38, 36 Stat. 11, 117, but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make the remedy exclusive. The right to sue the Collector for an unjustified collection was given by the common law."

It is also insisted that this Court in *United States* v. *Savings Bank*, 104 U. S. 728, indicated that a collector may not be sued on an allowed claim.[9] We submit that this Court had before it in that case the single question of jurisdiction of the Court of Claims in the case of an allowed claim. The government's contention would result in converting the word "may" used in the opinion, to read "must". This Court in *United States* v. *Hvoslef*, 237 U. S. 1, upheld the jurisdiction of the district court in an action against the United States based on a rejected claim, notwithstanding that the government insisted no action could be maintained against the United States on a rejected claim, citing as authority the *Savings Bank* case.[10]

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[9] "A rejected claim *may* be prosecuted against the collector, and an allowed claim not paid, *may* be sued for in the Court of Claims." *United States* v. *Savings Bank*, 104 U. S. 728, 734. (Italics supplied.)

[10] *United States* v. *Hvoslef*, 237 U. S. 1, at page 2; see *United States* v. *Emery, Bird, Thayer Realty Co.*, *supra*.

The district courts are invested with jurisdiction "of all cases arising under any law providing for internal revenue". §24 (5) Judicial Code as amended; 28 U. S. C. §41 (5).[11] There is an exception applicable only to customs cases for which an exclusive remedy has been provided by statute. This statute, by its terms, seems to cover "all cases" arising under the internal revenue laws.

We submit that the case at bar is one arising under the internal revenue law. The declaration draws in question the provisions of various internal revenue acts and reference thereto is necessary to a decision on the merits.

In the *Bouvit Teller* case, *supra*, on which the Court below relied, this Court said at page 259:

> "This action was brought to recover the amount of an overpayment of income tax for the year ended January 31, 1919, as determined by the Commissioner of Internal Revenue and shown in his certificate No. 990,988 issued to plaintiff May 12, 1927."

And at page 265, this Court said:

> "* * * Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. *The action is not for the overpayment of the tax in 1919, but is grounded upon the determination evidenced by the certificate*

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11 This section reads:

"The District Courts shall have original jurisdiction as follows:

'Cases under Internal Revenue, customs and tonnage laws.—Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.'"

issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action upon which this suit was brought." (Italics supplied.)

The government emphasizes the italicized portion of the foregoing quotation as indicating a ruling by this Court that an action on an allowed claim evidenced by a certificate, is not a suit to recover taxes. In its brief in the *Bonwit Teller* case, the government took a contrary position.[12] After the *Bonwit Teller* case was remanded to the Court of Claims, the question of interest was strenuously litigated. That court upheld the taxpayer's right to interest from the date of payment of the tax, 52 F. (2d) 904, and the petition of the government for certiorari, was denied. 285 U. S. 538.

It is submitted that the allowance of a claim and the issuance of a certificate does not convert the action into one on contract. The *accrual* of the taxpayer's cause of action did not exist at the time he paid the tax. The statute requires forbearance until the Commissioner has acted. When his action is final, as evidenced by a certificate when the determination is favorable, the cause of action accrues. Nothing to the contrary, we believe, was intended

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[12] There the government stated:

"Similarly the instant suit may be on an account stated, if it is assumed that the Commissioner had authority to allow the claim for refund. *But it is also a suit for the recovery of taxes,*[3] and on such ground the United States may be sued only as it has consented to be sued, namely, within the limited period of time prescribed by §3226." (Italics supplied.)

"[3] That this is the character of this proceeding is indicated by the prayer for interest in the petition in the court below (R. 1) seeking interest from July 10, 1919, the date of alleged overpayment. On the account stated theory no interest would be allowable against the United States (Jud. Code, §177; U. S. C. title 28, §284); if it were allowable, it would run only from March 8, 1927, the date of allowance and accrual of any contractual right of action."

by this Court in the *Bonwit Teller* case. The government's insistence in that case that a claim for refund, which is a familiar requirement in tax actions, was not filed, appears inconsistent with its present contention that the action is not to recover a tax.

The Court below stated that the collector had nothing to do with the issuance of the certificate. This is undoubtedly true but the statute requires the Commissioner, not the collector, to pass upon the claim and to issue the certificate (R. S. §§3182-3). Similarly, in the case of a rejected claim, it is the Commissioner's determination which is the condition precedent before action may be commenced against the collector. Under no circumstances may the Commissioner be sued to obtain a refund of taxes. *Spalding* v. *Vilas*, 161 U. S. 483, 498, 499. There is nothing that the collector does in the case of a rejected claim which he does not do in the case of an allowed claim.

The ruling of the court below, which we say is erroneous, was adopted by the Circuit Court of Appeals for the Second Circuit and was used as a basis of construing the amendment to the Tucker Act,[13] in holding that the United States

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[13] Revenue Act of 1926, §1122 (c), c. 27, 44 Stat. 9, reads as follows:

> "(c) The paragraph added by §1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of §24 of the Judicial Code, relating to the jurisdiction of district courts, as amended, is re-enacted without change, as follows:
>
> 'Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.'"

See *New England Mutual Life Ins. Co.* v. *United States* (Ct. Cl.) 52 F. (2d) 1006, 1008.

may not be sued in the district court where the basis of the action is the allowance of a claim.[14]

We respectfully urge that there is no warrant for making a distinction between an action against the collector based on an allowed claim and one based on a rejected claim. The taxpayer, we submit, may sue the collector or the United States in the Court of Claims[15] and where the collector who collected the tax is dead or retired, the suit may be against the United States in the district court, irrespective of whether the claim was allowed or rejected. We submit there can be no question that the Court of Claims has jurisdiction of a proceeding based on an al-

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[14] *Moses* v. *United States*, 61 F. (2d) 791, 793. In this action, it was pleaded and proved that the collector who collected the tax was out of office at the commencement of the action. The Court said:

> "This condition makes apparent the intent of the legislation, namely, to permit suit against the United States as an alternative to a suit against a deceased or retired collector. Of suits against a collector the district court already had jurisdiction unlimited as to amount. Jud. Code §24 (5) (28 U. S. C. A. §41 (5)) * * * We think it clear that the suits allowed under the amendment must be of the same kind as those for which they are a substitute. In other words, after the amendment, if the collector by whom the tax was wrongfully collected is still in office, the suit must, as before, be brought against him, if the claim exceeds $10,000; but if he is out of office, then it may be brought in the District Court against the United States regardless of the amount claimed. Hence, unless the plaintiff's suit is one that could be brought against a collector, it is not within the jurisdiction conferred on District Courts by the amendment."
>
> "Accepting the appellants' theory of their suit the cause of action is grounded upon the commissioner's determination evidenced by his certificate of overassessment. *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265. The liability of the United States rests upon an implied promise to pay the allowed refund. *United States* v. *Savings Bank*, 104 U. S. 728, 733; *United States* v. *Kaufman*, 96 U. S. 567, 570. But no such cause of action can arise against a collector. He can neither allow a refund nor draw money from the Treasury to pay it. Hence no suit will lie against him based on the allowance of a refund."

See *Bertelsen & Petersen Eng. Co.* v. *United States*, 60 F. (2d) 745 (C. C. A. 1), decided after the case at bar; *United States* v. *Pfitsch*, 256 U. S. 547.

[15] See *Dooley* v. *United States*, 182 U. S. 222, 225.

lowed claim.[16] We contend that whatever jurisdiction is possessed by the Court of Claims is also possessed by the district courts in actions against the collector and in actions against the United States under the Tucker Act, as amended.[17]

II.

Revised statutes §3226 has no application where the action is based upon an allowed claim.

The government insists that since the case at bar was commenced more than five years from the date of the payment of the 1918 tax, R. S. §3226 as amended 26 U. S. C. §156,[18] is a complete bar.

The proof is incontrovertible that the claim filed by the taxpayer (R. 47) was timely filed (R. 48) pursuant to §252 of the Revenue Act of 1921 in force and effect in 1923 and duly allowed as evidenced by the Schedule of Overassessments (R. 37), the Schedule of Refunds and Credits (R. 37) and the Certificate of Overassessment (R. 31).

In the *Bonwit Teller* case, *supra*, this Court had the

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[16] See *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *Savings Bank*, 104 U. S. 728; *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258.

[17] See *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 561. The Court said:

> "Moreover, whatever jurisdiction is possessed by the Court of Claims to review determinations under §§327 and 328 would be possessed also by the District Courts in suits against collectors and in actions against the United States under Section 24 (20) of the Judicial Code."

[18] "No suit * * * for the recovery of any internal revenue alleged to have been erroneously or illegally assessed or collected * * * shall be begun * * * after the expiration of five years from the date of the payment of such tax * * * unless such suit * * * is begun within two years after the disallowance of the part of such claim to which such suit * * * relates * * *."

occasion to pass on the very same contention. There the Court said at page 265:

> "The Government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by R. S. §3226, as amended 26 U. S. C. §156. It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. * * * Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. *United States* v. *Kaufman*, 96 U. S. 567, 570; *United States* v. *Savings Bank*, 104 U. S. 728; *Bank of Greencastle's Case*, 15 C. Cls. 25. There is no merit in the contention that the suit is barred."

In the case of *Arnson* v. *Murphy*, 109 U. S. 238, this Court had before it a statute similar to R. S. §3226. The Court said (pp. 242, 243):

> "It appears to us quite plain, that no action arises to the claimant, in such cases, until after a decision against him by the secretary of the treasury; and that his suit against the collector is barred unless brought within ninety days after an adverse decision upon his appeal but with the proviso, that if such decision is delayed more than ninety days after the date of his appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter. It cannot be said that he is obliged, in case for any reason a decision at the Treasury Department is delayed beyond the appointed time, to treat the delay as an adverse decision, and to bring his suit

> while the matter is *sub judice*. There is no language in the act requiring such a conclusion, it is inconsistent with the terms actually employed, and is not founded on any sufficient reason. * * * There is nothing to forbid his waiting, without suit, as long as he has reason to expect a favorable decision upon his appeal."

In the case at bar, the right of the plaintiff to commence his action did not accrue until the Commissioner had passed upon its claim. This Court has held that the date of allowance of a claim, for the purpose of construing whether interest was payable under the various revenue acts, is the date that the Commissioner signed the Schedule of Refunds and Credits.[19] In the case at bar, the Schedule of Refunds and Credits (R. 37) was signed on February 18, 1924. This action was commenced on or about February 3, 1930 (R. 2). The certificate of overassessment was issued on or about May 16, 1924 (R. 55). No matter which date is considered in determining when plaintiff's time to commence suit started to run, the action was brought in time.

It may be observed that R. S. §3226 provides for a short statute of limitations of two years in the case of a rejected claim. This Court has held that the action must be commenced within two years from the date of rejection, irrespective of whether notice of rejection has been given to the taxpayer.[20] It seems that the statute is completely silent, however, on the period of time within which a taxpayer may sue in the case of an allowed claim. We urge that the general statute of limitations is for that reason applicable. We submit that there is no merit in the claim that the suit is barred.

Respectfully submitted,

DANIEL AUSTIN SHIRK,
Amicus Curiae.

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[19] *United States* v. *Swift & Co.*, 282 U. S. 468; and *United States* v. *Boston Buick Co.*, 282 U. S. 476.

[20] *United States* v. *Michel*, 282 U. S. 656.

SUPREME COURT OF THE UNITED STATES.

No. 537.—October Term, 1932.

Arthur C. Harvey Company, Petitioner, *vs.* John F. Malley and/or Malcolm E. Nichols, Former Collectors.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 13, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner sued respondents in the United States District Court for Massachusetts to recover alleged overpayment of taxes. After waiver of trial by jury the judge heard the cause upon the pleadings and evidence and gave judgment for the respondents. The reasons therefor were stated in an opinion dealing generally with the issues of law and fact. The Circuit Court of Appeals affirmed this judgment and undertook to support its action by an opinion. A duly authenticated bill of exceptions setting forth the evidence and the proceedings at the trial is in the record; also, appropriate assignments of error. No assignment makes substantial claim of error based upon the pleadings alone.

The Circuit Court of Appeals rightly found—

> "There was a waiver of a jury trial and the case was heard by the judge without a jury. A request for findings of fact and rulings of law was made by the plaintiff, but no special findings were made nor were the requested rulings of law either made or refused, nor were any exceptions to a refusal to rule as requested 'taken in the course of the trial.' So far as any rulings of law were made 'in the course of the trial,' with one exception they were in favor of the plaintiff, and though an exception was allowed in this instance, it is not relied upon in the assignments of error. . . . The findings of fact are general, and no rulings of the court were excepted to 'during the course of the trial,' which are relied on. Ex-

> ceptions, following an order of judgment, to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, are not rulings in the course of the trial. . . . Each of the assignments of error in this case relates either to matters of fact or to conclusions of law embodied in the opinion. These are not open to review, as there were no special findings of fact and no exceptions to rulings on matters of law were taken during the course of the trial and duly preserved by a bill of exceptions, and no questions of law favorable to the plaintiff are raised on the pleadings."

Notwithstanding the condition of the record the appellate court proceeded to discuss sundry questions beyond the pleadings, not pertinent because not properly raised, and decided them against the petitioner. The challenged judgment was rightly affirmed, but this should have been done upon the ground that the assignments of error presented for consideration no substantial question of law or fact.

The Revised Statutes, as amended, provide—

> "Sec. 649. Issues of fact in civil cases in any circuit [district] court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (U. S. C., Title 28, Sec. 773.)
>
> "Sec. 700. When an issue of fact in any civil cause in a circuit [district] court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court [Circuit Court of Appeals] upon a writ of error or upon appeal; and when the finding is special the review may extend to determination of the sufficiency of the facts found to support the judgment." (U. S. C., Title 28, Sec. 875.)

In *Fleischman Co.* v. *United States*, 270 U. S. 349, 355, 356, 357, this Court construed and applied the above Sections and the doctrine there approved is decisive of the present cause. Through Mr. Justice Sanford, we said—

"The opinion of the trial judge, dealing generally with the issues of law and fact and giving the reasons for his conclusion, is not a special finding of facts within the meaning of the statute. . . . And it is settled by repeated decisions, that in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute. . . . To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. . . .

"These rules necessarily exclude from our consideration all the questions presented by the assignment of errors except those arising on the pleadings. All the others relate either to matters of fact or to conclusions of law embodied in the general finding. These are not open to review, as there were no special findings of fact and no exceptions to the rulings on matters of law were taken during the progress of the trial or duly preserved by a bill of exceptions. The defendants offered no exceptions to the rulings of the court until after the writ of error had issued, transferring jurisdiction of the case to the Court of Appeals. And the recitals in the subsequent 'bills of exceptions' that the exceptions, then for the first time presented, were to be taken as made before the entry of the judgment are nugatory. A bill of exceptions is not valid as to any matter which was not excepted to at the trial. . . And it cannot incorporate into the record *nunc pro tunc* as of the time when an exception should have been taken, one which in fact was not then taken.

"The statute, however, relates only to those rulings of law which are made in the course of the trial, and by its terms has no application to the preliminary rulings of the District Judge made, in the exercise of his general authority, before the issues are submitted to him for hearing under the statutory stipulation. Such rulings on pleadings and the sufficiency of the complaint are therefore subject to review as in any other case, independently of the statute."

And see *Wilson* v. *Merchants' Loan & Trust Co.*, 183 U. S. 121, 127; *Martinton* v. *Fairbanks*, 112 U. S. 670.

As the assignments of error presented no substantial point based upon the pleadings and the discussion of the court related to points not properly before it, affirmance of the judgment by us does not indicate approval of what was said in respect of those points.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.